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Customary norms, treaties and state practice: analysis, interpretation and critical thoughts

Robert McDevitt

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To my family

Customary norms, treaties and state practice: analysis, interpretation and critical thoughts

Introduction

In recent decades, the formation of contemporary international law has been based on an evolution directed and framed by the main actors, that is the states, as new subjects that enrich the panorama of the international scene (Weil, 1983; Kirgis, 1987; Fidler, 1996; Roberts, 2001 ; Guzman, Meyer, 2008; Petersen, 2008; Kammerhofer, 2012; Kadens, Young, 2013; Guliyev, 2017; Combacau, Sur, 2019)[1]. It is certain that the state continues to be the main protagonist of international law, remaining we dare to say many times deprived of its national rights, towards a system that produces centralized norms through judicial control by super partes bodies, i.e. by permanent bodies allowing a certain

[1]According to Kammerhofer: "(…) change within the production process of the customary norm, contrasting a "traditional" approach, based on the induction of this from states' practice, to a "modern" one, focused rather on the deduction of the norm from abstract declarations, in particular of conventional provisions or resolutions of international organizations, sometimes qualified as a form of practice but more often relevant, rather, as evidence of the opinius juris (which would therefore replace practice as the cornerstone of the normative process (...)".

effectiveness of executive instrumentality. The international order is a legal system that gives a continuous "certainty" in the law as a qualifier of a national legal system, thus requiring the continuous peaceful coexistence between states towards the realization of common goals that impose the continuous existence, rectius permanence of a juridical community of supranational character (Weil, 1983)[2]. All sovereign bodies (subjects) are endowed with the same value, as creators of international norms that accept agreements at an equal level towards the consolidation of the community of states, i.e. of behaviors that adopt international legality as a way for the survival of their own state (Portman, 2010; Anzola-Rodrìguez, 2012; Baker, 2012; Carty, 2012; D'Aspremont, 2014; Corten, 2016, Heller, 2018)[3].

[2]According to Weil: "(…) the international society would be a "society of juxtaposition" of equal sovereignty, in which the law would serve to "temper anarchy" (…) this objective could be achieved only respecting the will of the states, the neutrality of the right, and therefore of the positive norm (…)".

[3]According to Heller: "(…) Recognition of the role of practice within international law can be ascribed to the positive school of the seventeenth and nineteenth centuries, which in response to natural law attempts to find a "positive" place for the normativity of interstate relations". Francisco Suarez was among the first to propose an ius gentium not as a product of the divine or of reason, but of the usus, but only centuries later the German

Thus international law as a consensual law (Danilenko, 1988; Wolfke, 1993; Petsche, 2010; Landau, 2012; Prost, 2012; Fuentes, 2016; Henry, 2017; Combacau, Sur, 2019)[4] supports the consensus of states, i.e. of the international community viewed as a whole which constitutes the usable foundation for the existence of an international legal system of broad democratic inspiration and of superior constitutionality from national law (Charney, 1993)[5].

historical school recognized, as a consequence of the value attributed to the spirit of the nation (Volksgeist), that of practice as a basis for reconstructing the regulatory relations between state bodies, insofar as it constitutes the expression of a conviction of legality on the part of the same people (Volksüberzeugung). "Consequence of this approach would however be the current incapacity of the internationalist scholar to play an effective role of intervention within the international context, since the same doctrine, in which he moves, revolves around the centrality of the current behavior of the state (…)".

[4]According to Danilenko: "(…) not every single substantive norm needs to rest on the consensus of all states". In particular, even the most strenuous defenders of consensualism admit that, at the time of ascertaining the custom, proof of the consent of each individual state cannot be required. On the contrary, it is able to presume that starting from an inert attitude, can "constitute acquiescence (…)".

[5]According to Charney: "(…) It would be after consensus that states lend themselves to secondary norms (in the Hartian sense, that is to say, the norms of production) of international law, rather than requiring themselves

Within this system, the sources of international law are presented as important foundations (D'Aspremont, Besson, Knuchel, 2017), as a consolidated behavior of the state which remains the main method of continuous training that detects the international law both in its measure and as a translation of a multi-state coordinating activity. In this spirit, every treaty and international agreement[6] is formed with its own measures and the relative

as the foundation of primary (substantial) norms. In particular, states would accept the norm that allows the birth of habits regardless of the expression of an express consent. In any case, the states could change their consent to the initially accepted production standard, recognizing, for example, that a general rule (hence, in the broad sense, a custom) can arise today also starting from the proceedings of a conference or an international organization (see, also for a comparison between the idea of a "social contract" and the possible alternatives (…)".

[6]The treaty is considered by most to be one of the priority manifestations of the conduct of the state, as well as one of the most readily available evidence of such conduct, and at the limit also of the opinius juris of the state (to the extent that the provisions of the treaty can be referred to a customary in the past crystallized, or possibly in the future). It is, however, appropriate to embrace the idea, moreover recognized by the International Law Commission, that the treaty itself cannot constitute "practice", but rather proof of a custom or, indeed, of its subjective element. See Conclusions 6 [7] .2 of the Commission's work on Identification of the Customs, which indicates as a form of practice not the treaty but the practice connected to it. The provisions of the treaty in themselves are instead

behaviors compulsorily obtained by giving impetus to the reaction of other states, other international subjects who protest or remain silent in the face of it (Wolfke, 1993)[7]. The final objective is the elaboration of a comparison between the practice and the formation of customary elements, i.e. the practice as an interpretative tool of the treaties according to ex Article 31.3.b) of the Vienna Convention on the Law of Treaties (VCLT) (Fitzmaurice, Merkouris, 2020)[8].

We do not indicate the elements that constitute the practice, but

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qualified as "form of opinio juris" from the Conclusion 10 [11].2 (for the current version of the conclusions approved by the Commission at first reading see: A/CN.4/L.872).

[7]According to Wolfke: "(…) Article 38 of the ICJ Statute identifies the custom as "evidence" (evidence or attestation) of a "general practice accepted as a right" (...)". Such an arrangement has for a long time occupied the doctrine, divided between those who recognized the practical role of proof of the practice, and those who kept to the letter of the article argued that it was customary to constitute proof of practice.

[8]Article 31, par. 3 affirmes that: "3. There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties (...)".

first of all we take into consideration the doctrine which requires, within an even informal process, the production of all the stages of the customary norm which force the pre-established dimension and its constituent elements as an exercise which is devoid of other types of utility (Mcginley, 1985)[9].

With regard to the psychological element[10] we are still on the road to discussion regarding consensus which does not perform some kind of function (Danilenko, 1988) and also those which recognize consensus as a various form relevant for the formation of an agreement (Macgibbon, 1982; Bos, 1982; Kohen, 2004; Cassese, 2005; Guzman, Meyer, 2008; Shaw, 2017; Gaeta, Viňuales, Zappalà, 2020)[11]. In this sense we must follow not so

[9]In this sense, see lastly the second report formed by Sir Michael Wood on the identification of custom (A/CN.4/672, par. 41): "(…) given the inevitability and peace of change, political and technological, it is neither it is possible to provide an exhaustive list of these "material sources" of customary international law. Many problems arising in international law", referring to the work of Hudson in 1950 on "Ways and means for making the evidence of custom law (...)".

[10]Because of the approach adopted in this thesis, it is preferred to adopt the term "psychological" to indicate the opinio juris. When we speak of a "subjective" aspect we refer instead to the analysis of the subjects who contribute, in various ways, to the formation and the ascertainment of the customary norm or of the subsequent practice.

[11]For example, Bos affirms: "(…) the conviction of the need to follow the

much the doctrine but the practice to consider positively the arguments that arise in relation to the declarations of the states and their relevant activities (D'Amato, 1971; Wolfke, 1993; Zemanek, 1995; Müllerson, 1998; Schachter, 1989; Yee, 2015)[12] thus offering an interminable list of various manifestations in practice and at the same time focusing on various problematic aspects such as general, uniform, enduring requirements that repeat the practice as a value that seeks to verify, rectius interpret the practice. An interpretative practice that is not an object of low interest (Nolte, 1994; Di Stefano, 1994; Aust, 2007; Linderfalk, 2007; Gardiner, 2008; Fitzmaurice, Elias, Merkouris, 2010;

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practice (…)". Sohh speaks for: "(…) "general acceptance" (…)". Danilenko affirms the: "(...) will to recognize (…)". Guzman, Meyer characterized as: "(…) "expectation/belief" that the other state is obliged (…)". Kohen: "(…) as "consensus" of international society (…)". Shaw affirms: "(…) the "belief" of the juridical nature of a behavior (…)". Cassese implies: "(…) that such a sense of obligation can be recognized only when the rule already exists, while in the phase of its formation it would actually be something else (opinio necessitatis according to true consensus, understood as a sufficient condition for the existence of a bond) (…)".

[12]As it will be said, "(…) the Commission takes this position in the project on the identification of custom (see also Wood's second report, A/CN.4/672, par. 37 ss). The current Conclusion 6 [7]: "Forms of practice-1, includes both physical and verbal acts. (...)", in A/CN.4/L.872, p.2.

Cannizzaro, 2011; Parry, 2016) but of a scope of an interpretative process that leads to a precise content, a device of a conventional nature towards an implemented practice of the treaty that pushes beyond the boundaries of the same reaching the point of modification and/or reacquisition of a normative significance of its own sense (Aust, 2007; Linderfalk, 2007)[13].

According to Article 31.3.b VCLT the "subsequent practice" (Fitzmaurice, Merkouris, 2020) seeks to identify the relative means of main interpretation which constitute state practice, i.e. means that are parts to an international agreement (Fitzmaurice, Elias, Merkouris, 2010). Thus occurs the "subsequent practice" as it is rightly identified by the VCLT, i.e. as a tool that resolves interpretative issues and applies the conventional rules, distinguishing the identification of the elements that characterize the practice (Fitzmaurice, Elias, Merkouris, 2010) and are understood in a general way as components of international custom (Bodansky, 1995). Thus the "what" of characterization of the practice from an objective point of view is highlighted and the "which subjects" as a relief of the relative production of assessment which starts from the supranational activity of each

[13]In as much as, "as can be seen from article 31" ("General rule of interpretation"), all the elements found in the article hold equal interpretative value. On the so-called "crucible approach", as called by the ILC itself in the commentary of article 31 (…)".

Member State is part of the international scene performing thus the relative binding function that causes necessary obligations (Crawford, 2014)[14]. Within this context we see the relative results of any research of a doctrinal nature that has to do with customary and the interpretative theme of the treatises as a means of subsequent practice. Thus a transversal perspective is sought which in any case verifies the meaning of the research data which can thus be transferred to each level which is in opposition[15].
We start from the work of the International Law Commission (ILC) to better understand the subsequent training practice of customary law[16]. We recall the first works of 2008, where the

[14]Crawfrod: "(…) concrete outlines of the requirements of generality, uniformity and repetition, scarcely verified in the discourse on the subsequent practice, as treated in an equally scarcely conclusive manner in the examination of the custom. More convincing (and congruent, in relation to the comparison between the two areas) is the examination of the value of inertia, which the International Law Commission seems to submit to the same requisites in order to recognize acquiescence to a practice of others, both whether it is a question of identifying a custom, whether it is a matter of highlighting an interpretative practice of a treaty (…)".

[15]As indicated shortly in the text, the project, initially titled: "Treaties over time within the work program of the International Law Commission, became in 2012: "Subsequent agreements and subsequent practice in relation to interpretation of treaties".

[16]The work is now entitled: "Identification of customary international law",

ILC proposed 13 concluding statements from the related proposals of the special rapporteur Georg Nolte which are part of four elaborated reports[17]. The related conclusions of the ILC are part of the annual report of 2016 and are subjected to a first reading by the states[18]. The ILC recalled the related Articles 31 and 32 of the Vienna Convention of 1969 (Fitzmaurice, Elias, Merkouris, 2010; Fitzmaurice, Merkouris, 2020) thus trying to focus on the interpretative value of agreements that are part of a subsequent practice. The related work entitled: "Treaties over time" allows us to arrive at an at least broader theoretical conclusion[19] since already from 2012 we note modified the title,

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after being introduced in the work program of the ILC in 2012 with the title: "Formation and evidence of customary international law", entrusted to Special Rapporteur Michael Wood.

[17]Preceded by three others addressed to the Study Group that the Commission had set up before appointing Nolte in 2012 as Special Rapporteur, also with a view to publicizing the survey. The reports for the Study Group are not published by the Commission. From 2013 to 2016, on the other hand, the reports Nolte drew up are just four and are available on the Commission website, under the designation A/CN.4/660, A/CN.4/671, A/CN. 4/683 and A/CN.4/694.

[18]See: A/71/10, Chapter VI (pp. 118-240).

[19]Among the proposed arguments Nolte; "(...) to the Commission included not only the interpretative function of the subsequent practice, but also the effects of subsequent acts and facts on the existence of the treaty, the effects

reflecting thus the related approach which was more restrictive. Already Article 31 VCLT has placed the agreements and the subsequent practice in a circle of a "general rule" we can say, of interpretation (Kammerhofer, 2017) as an object and objective (Linderfalk, 2007)[20] where the same ILC has begun to investigate the operational limits of components that are part of the general rule that is used by the states in their own attempt as "governments", i.e. a state interpretation of a treaty that is not the subject of adequate systematization[21].

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on the treaty of norms occurred (customary, also binding, or coming from others treaties), and the obsolescence of conventional provisions (A/63/10, Annex A, paragraph 7 ff.). However, it should be noted that the remainder of this proposal was effectively focused on the problem of interpretation (…)".

[20]The same Draft Conclusion 1 of project states that: "2. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of its object and purpose (...)". See: U.N. Doc. A/CN.4/L.813.

[21]In particular, the Draft Conclusion 5 testifies the degree of affinity between the two projects covered by this study entitled: "Attribution of subsequent practice". The provision deals with the problem of which practice can be considered relevant, defining it as any conduct in the application of treaty which is attributable to a party to the treaty under international law. Residual value is attributed to the practice not included in this definition, for the sole purpose of assessing the subsequent practice of parties to a treaty.

As we immediately understood, up to now the formation of customary laws started in 2012[22] and the ILC through the related final conclusions of the work of the special rapporteur Michael Wood[23] and especially Part III of these conclusions are specifically addressed to the general rule (the general practice) that accompanies the acceptance of law as the end of production of a customary norm and as a classic scheme of dualistic inspiration[24].

In practice, states attribute a main role for the creation of the customary rule (Linderfalk, 2007) where the ILC allows the creation of a non-exhaustive list of behaviors that are valid as practices, and as figures of a practice that have to do with the connection of treaties as evidence of the affinity between these types of projects[25]. The investigation phase was concluded with

[22]The ILC initially calls the work "Formation and evidence of customary international law", but, again, the title is modified, the following year, in "Identification of customary international law". The reasons are due to the inappropriateness, underlined by some members of the Commission, to refer to the training process of the custom, having to focus on the investigation on its assessment.

[23]Nominated Special Rapporteur in the same year 2012, Wood has so far prepared four reports, available on the Commission website: A/CN.4/663, A/CN.4/672, A/CN.4/682 e A/CN.4/695.

[24]Starting from the second Report of Wood (A/CN.4/672, Session IV).

[25]See Conclusion 5 [6] of the ILC: "Conduct of the state as state practice".

regard to the custom as well as the report of the ILC of 2016 with a commentary that was submitted to the states[26].

Customs and treaties. ILC's work and evolution of customary law

Reading paragraphs 25 and 28 of the memorandum of 2013 which concerned the relationship between customary and conventional international law, one immediately recognizes that in the VCLT there is the possibility of a conventional norm where in tempis it becomes customary (Fitzmaurice, Elias, Merkouris, 2010; Noute, 2013; Bjorge, 2014)[27] thus trying to explain the

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State practice consists of conduct of the State, whether in the exercise of its executive, legislative, judicial or other functions. (A/CN.4/L.872, p. 2).

[26]See Conclusion 6 [7] ("Forms of practice"), in the second paragraph we read: "Forms of state practice include, but are not limited to: diplomatic acts and correspondence; conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference; conduct in connection with treaties; executive conduct, including operational conduct "on the ground"; legislative and administrative acts; and decisions of national courts (…)", (A/CN.4/L.872, p. 2).

[27]See, Article 38 of the Vienna Convention on the Law of Treaties (VCLT): "Rules in a treaty becoming binding on third states through international custom. Nothing in Articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third state as a customary rule of

related effects to third countries. The Secretariat already recognized, during the work of the ILC, the tendency to accept the agreement as an element of evidence of customary norms, even if it was a codification treaty[28].

The ILC admits that an agreement contributes to the consolidation and/or evolution of customary norms which are formed and at the same time repeat that a norm and/or a series of treaties cannot automatically determine the formation of a custom (Corten, Klein, 2011)[29]. Thus an agreement can modify a final treaty (Noute, 2013)[30] and at the same time can derogate a

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international law, recognized as such (...)".

[28]A/CN.4/659, p. 33: "Observation 25-Recognizing that a treaty may codify existing rules of customary international law, the Commission has often referred to treaties as possible evidence of the existence of a customary rule".

[29]A/CN.4/659, p. 33-34: "Observation 26-While indicating that a treaty does not itself bind third states, the Commission has, on several occasions, recognized that treaties may contribute to the crystallization or development of a rule of customary international law. The Commission, however, has found that the frequent enunciation of a provision in international treaties did not necessarily indicate that the provision had developed into a rule of customary international law (…)".

[30]A/CN.4/659, p. 34: "Observation 27-The Commission has alluded to the possibility that the emergence of a new rule of customary international law may modify a treaty, depending on the particular circumstances and the

treaty with customary norms even though they are not binding but apply as obligations of interpretation. Consequently, this process brings to light international norms that already exist and also can include other types of customs (Noute, 2013)[31].

By reading the conclusions n. 6 (7) we understand the forms of practice as "acts of connection with the treaties" and with n.10 (11) the evidence of opinion juris of a "provision of a treaty" (Fitzmaurice, Merkouris, 2020), where the ILC has drafted in order to highlight the clarification of the relationship between custom and treaty (Noute, 2013)[32]. Finally, we consider conclusion n. 11 (12) which is placed in the Drafting Committee

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intentions of the parties to the treaty (...)". Here the Secretariat refers to Article 38 of the 1966 Draft of the Convention on the Law of Treaties, dedicated to the possibility of amending a treaty through the successive state practice.

[31]A/CN.4/659, "Observation 28-The Commission has recognized that, with the exception of jus cogens norms, states may depart from rules of customary international law through the conclusion of bilateral or multilateral agreements. At the same time, the Commission has emphasized that a treaty, (...) must be interpreted and applied in the light of existing rules of international law, including customary law (…)".

[32]See point I.3.2. In particular, "(…) practice in connection with treaties", in the conclusion proposed by the special rapporteur, becomes "acts in connection with treaties'"in the formulation of the Drafting Committee (…)".

under the title: “significance of certain materials for the identification of customary international law”, putting together its resolutions (Cassese, 1984; Meron, 1987; Greenwood, 1991; Meron, 1996; O 'Keefe, 2004; Shahabudden, 2004; Meron, 2005; Wouters, Verhoeven, 2005; Kress, 2006; Henckaerts, Doswald-Beck, 2009; Ventura, 2015; Gaeta, Viňuales, Zappalà, 2020).

Treaties and third report of the ILC

The third report of the ILC highlighted the behavior of the states in “connection with the treaties” thus recognizing the form of the practice in the conclusion 6 (7) and the “treaty practice” which we read in the conclusion n. 10 as possible evidence of opinio juris where the Drafting Committee[33] expresses the opinions of the special rapporteur who recalled the in-depth study useful as a commission mandate which concerned the role of its own treaty in the identification formation of customs and not as a whole

[33]Draft Conclusion 12-Treaties: “(...) A treaty provision may reflect or come to reflect a rule of customary international law if it is established that the provision in question: (a) at the time when the treaty was concluded, codifies an existing rule of customary international law; (b) has led to the crystallization of an emerging rule of customary international law; or (c) has generated a new rule of customary international law, by giving rise to a general practice accepted as law (…)”.

between customs and treaties[34]. This is a role certainly recognized to the Commission[35] which does not have to do with the dating equivalence between the conventional system and custom, but recognizing that in this way it constitutes the existence and content of one's own custom. Within this context, the states in the moment of the conclusion of each treaty constitutes in practice a "preliminary response" towards the existence of a custom which avoids, indeed carries out the relative investigation on "primary evidence", i.e. on state practice[36]. Thus we recall the International Court of Justice (ICJ) where back in 1985 underlined that: "(...) the treaty alone could be considered definitive proof of custom, having instead to seek practice and opino juris in the concrete case (...)" (Kałduński,

[34]A/CN.4/682, par. 31. Secretariat memorandum of 2013.

[35]Resumed from the 2013 Secretariat Memorandum (see above), particularly in the 1950 Hudson report: "(...) which already admitted that the conventional constraint could extend beyond the parties to the treaty if its customary nature was recognized, and that even multilateral treaties do not be in force could constitute proof of custom (paragraph 32) (…)".

[36]A/CN.4/682, par. 31. Secretariat memorandum of 2013, par. 33. "(…) the terminology adopted by the Secretariat in the Memorandum of 2013 seems to resound here, where it was distinguished, in fact, between "primary" proofs (evidence of custom, that is the actual practice) and secondary tests (evidence of states' practice); this terminology is not otherwise adopted by the special rapporteur (…)".

2015; Liakopoulos, 2019; Liakopoulos, 2020a; Liakopoulos, 2020b)[37].

Jurisprudential opinions that are part of the "history" were written by the ILC in this sector. Let us take into consideration the special rapporteur who reminded us the ways in which a treaty affects customary law in an incisive or not way, contributing to and ascertaining thus the codification of existing customs at the moment of its conclusion as a moment of crystallization of an emerging rule which leads to a new practice

[37]ICJ, Continental shelf (Libyan Arab Jamahiriya v. Malta), application of intervene, ICJ Reports 1984, p.22, parr. 34-35. "(...) the draft convention of the third conference on the law of the sea (contains) any detailed provisions on the regime of historic waters. There is neither a definition of the concept nor an elaboration of the juridical règime of historic waters or historic bays (…). It seems clear that the matter continues to be governed by general international law which does not provide for a single regime for historic waters or historic bays, but only for a particular regime for each of the concrete recognized cases of historic waters or historic bays (...)". For the historic bays see also: Memorandum by the Secretariat of the United Nations, UN Doc. A/CONF.13/1 of 30 September 1957; Juridical regime of historic waters, including historic bays, UN Doc. A/CN.4/143 of 9 March 1962. Documents that are mentioned also in South China arbitration (The Republic of Philippines v. People's Republic of China), sentence of 12 July 2016, par. 205, note 197 and, in Bay of Bengal maritime boundary arbitration between Bangladesh and India, sentence of 7 July 2014.

that is accepted as a right[38]. The first hypothetical element is when the treaty expressly declares a customary norm[39] and/or affirms a relative codification in partem, as a progressive development of international law[40], and/or perhaps implicitly gives shape to an important requirement, i.e. the written form of a custom[41]. Thus the provisions of the treaty which have a declaratory nature to an existing customary law which finalizes the development of the codification, occur in a concrete way. At this point we can characterize it as "incorrect", given the imperfect correspondence that exists between the customary law and that of codification that goes beyond the evolution of customary law itself. This is how the opinio juris of the states and the preceding time for a treaty are verified, also including the preparatory works[42] and the declarations of the states, as a practice of the non-participating states.

[38]A7CN.4/682, Par. 35, he special rapporteur recalls that the three processes can "fade" ("shade") one into the other.

[39]As we can see in the Preamble of the Geneve Convention of 1958 of high seas.

[40]As for example the Coonvention of New York of 2004 regarding the immunity jurisdiction of states.

[41]The special rapporteur recalls that the three processes can "fade" ("shade") one into the other.

[42]The special rapporteur recalls that the three processes can "fade" ("shade") one into the other.

It is a consolidated crystallization of a customary norm that comes when the treaty is negotiated (Hakapää, 2013), and/or when an agreement is reached during an intergovernmental conference. In this case we are not talking about a consolidation through the treaty but about a practice where the opinion juris of the states are part of a negotiation phase, as happened for example during the recognition of the exclusive zone at the third UNCLOS Conference[43]. Thus the treaty is at the basis of the development of new customary norms. It is a process that seeks to demonstrate the conventional disposition "of a fundamentally norm-creating character" (Gardiner, 2008; Fitzmaurice, Elias, Merkouris, 2010; Corten, Klein, 2011; Saqmso, 2011; Noute, 2013; Bjorge, 2014; Dörr, 2018), constituting thus a general rule[44] through a general practice that accepts the right outside the conventional obligation without being considered equivalent to a

[43]Although the UN Convention on the Law of the Sea was concluded in 1982 has entered into force more than ten years later. Despite the UN Convention on the Law of the Sea was concluded in 1982 and entered into force more than ten years later, the recognition of the area of exclusive maritime exploitation is recognized as a custom in force from the years of the third Conference.

[44]Returning to the words of the ICJ in the North Sea case, par. 72; Wood by way of example: "(...) identifies as not "fundamentally" the provisions of a treaty that identify the competences of the organs created by the same (A/CN.4/682, paragraph 39) (…)".

custom[45]. We can speak, however, of "a constraint" for non-participating states in the case of the continental shelf of the North Sea (Liakopoulos, 2019)[46], and in Article 38 of the VCLT Convention (Noute, 2013)[47].

There are also examples of law making treaties that reflect customary norms as we have seen in the 1958 Convention on the continental shelf and to the rules of interpretation contained in the VCLT[48]. The executive practice of a treaty is certainly useful for ascertaining the existence of a customary norm thus favoring the practice of the states that do not participate in the treaty and

[45]In the sense of an: "(...) "extensive and uniform" way above all, it is included the practice of the countries particularly concerned". Again, therefore, on the basis of the ruling of the ICJ regarding the North Sea (para. 73) broad participation in a multilateral treaty could itself determine the birth of a customary law, but the Special Rapporteur recalls that this hypothesis has never been specifically recognized by the court itself. Some argue that the 2004 Convention on State Immunity of Jurisdiction has also contributed to the definition of a customary norm, the one on immunity precisely, which however has far more distant roots.

[46]ICJ, North Sea Continental Shelf, Judgment, ICJ Reports 1969, p. 3.

[47]Article 38: "Rules in a treaty becoming binding on third states through international custom. Nothing in Articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third state as a customary rule of international law, recognized as such.

[48]A/CN.4/682, par. 40.

the behavior of the states that are part of it towards the non-participants (Baxter, 1970; Scharf, 2014)[49].

Thus the special rapporteur formulated the relative concluding considerations concerning the impossibility of deducing automatically any type of customary nature and a rule of mere repetition that provides for treaties which in reality goes beyond general international law. In such a way it arises also the opportunity to verify the signing of a ratification of a treaty as well as the possibility of placing reservations, i.e. circumstances of the conclusion of a treaty where it is in accordance with practice and which verifies the opinio juris of the states. Within this context we propose to read part V of the conclusions which is entitled by the special rapporteur as: "Particular forms of practice and evidence" and includes the related resolutions (Noute, 2013).

In formulating the conclusions, difficulties on the part of many members of the ILC are certainly noted, especially as regards the term "reflect"[50] as well as the lack of a reference to Article 38

[49]A/CN.4/682, par. 41. In particular, "(...) it deals with what in the doctrine has been called "paradox of Baxter" (...)". According to Baxter: "(…) the subsequent practice certainly plays a significant role in the interpretation of the Treaty under Articles 31.3.b and 32 of the Vienna Convention on the Law of Treaties (…)".

[50]Forteau (A/CN.4/SR.3251, p.6) and Escobar Hernández (A/CN.4/SR.3252,

VCLT (Noute, 2013). Thus the hypotheses that the special rapporteur has identified, have to do with the reviewing of the expressions that are used at all three phases[51] i.e. codification[52], crystallization[53], and formation of new customs[54]. Basically, the relationship between crystallization and the generative formation

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p.10), recall the problem of formation, which according to the latter it had to remain outside the Commission's work. Murase (A/CN.4/SR.3252, p.3), makes particular reference to the problems arising from the "recognized as" clause contained in articles and referred to the customary rules that the treaty could generate. See also Singh (A /CN.4/SR.3254, page 9).

[51]Kamto (A/CN.4/SR.3252, p. 15): "(…) as to Draft Conclusion 12, he proposed to split it into two paragraphs, the first of which would contain the chapeau and current subparagraphs (a) and (b), to delete the phrase "or come to reflect", which added nothing and might cause unnecessary confusion, and to amend subparagraph (b) to read: "has led, at the date of the conclusion of the treaty, to the crystallization of an emerging customary rule." The second paragraph of Draft Conclusion 12 would reproduce the substance of current subparagraph (c) and read: "A treaty provision may also create a new rule of customary international law, by giving birth to a general practice accepted as law (...)") and Jacobsson (A/CN.4/SR.3254, p. 4). It was doubtful whether subparagraph "(a) was necessary, since it was obvious that a treaty provision that codified a rule of customary international law could reflect that rule. In contrast, subparagraph (c) dealt with what now probably the main means by which customary law was formed, given the number of treaties that existed. Subparagraph (b),

of a custom[55] is not so clear without the passage between conventional disposition and custom being sufficient[56].

Within this context we recall that some members of the ILC (especially Wood) denied that: "(...) bilateral treaties could assume particular importance for the identification of general

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meanwhile, should be reworded or even deleted, as it sought to cover the transition of a treaty-based rule into a customary one and thus dealt with an emerging rule that did not yet form part of customary international law (...)".

[52]Forteau (A/CN.4/SR.3251, p. 6): "(…) with particular reference to letter a), so it would not suffice for a provision in a codification treaty to correspond to a custom existing at the time of conclusion of the same treaty, since in the meantime it may have changed. Instead, it should be stated that a customary rule codified by a treaty must still apply at the time of the attempt to identify the rule (…)".

[53]Hmoud (A/CN.4/SR.3251, p. 10) indicating: "(...) the need to verify the rule before, during and after the treaty, so that it can talk about "crystallization" (…)". The content of such an emerging rule must be asserted in three stages: before the treaty, during the treaty process and after the treaty, though, in reality, there was some overlap between the identification of an emerging rule that crystallized through the treaty. Petric (A/CN.4/SR.3253, page 8): "(…) besides not being clear the expression "in statu nascendi" used in the report (…)". Vázquez-Bermúdez (A/CN.4/SR.3253, p. 10): "(…) Draft Conclusion 12 (b) should be reformulated, due to the crystallization of an emerging rule of customary international law". The rule of customary international law in statu nascendi

customs (...)"[57]. They rejected the idea of sharing the difference between crystallization and generation (Noute, 2013), since in the first case the customary rule is already in the process of formation, while in the second it is primarily a conventional norm, only to become customary later[58].

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had crystallized with the adoption of the treaty provision. "Or" crystallizes an em erging rule of customary international law (…)". Kolodkin (A/CN.4/SR.3254, p. 6) having: "(...) to clarify the two possible meanings of the term "crystallization" (...)". It could be mean that a treaty provision could serve as evidence of the completion of the process of the formation of a rule of customary international law or that it could clarify the content of an emerging rule of customary international law.

[54]Wisnumurti (A/CN.4/SR.3252, p. 7). Kolodkin A/CN.4/SR.3254, p. 6, "(…) it is not clear whether in this case the treaty constitutes an element of practice or proof of opinio juris, or both (...)" and, Singh A/CN.4/SR.3254, p.9.

[55]Murase (A/CN.4/SR.3252, p. 3), "(…) in the sense that the difference between "emerging rule" and "new rule" would not be clear. In any case, recalls Murase, the work of the Commission should not concern the formation of customary rules and, Nolte (A/CN.4/SR.3253, p.6).

[56]Kittichaisaree (A/CN.4/SR.3251, p. 7), in particular criticizing the special rapporteur for having denied the so-called paradox of Baxter, especially in view of the fact that the treaties become more and more a legal instrument in today's world, the less "non-part" states to rely on to try existence of a corresponding customary norm, as required by the IGC in the judgment on

The corresponding treatment of the classical theory of the relations between customs and treaties contained in the sentence of the ICJ on the case relating to the continental shelf of the North Sea was only partially sufficient[59]. On the other hand, other members of the ILC asked the special rapporteur to also deal with other issues pertaining to the subject under investigation,

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the continental platform of the North Sea. In this sense it would be appropriate to rely on a theory such as Provost, so that the scarcity of practice would be compensated by the opinio juris (therefore not far from the "sliding stairs" of Kirgis). Already recalled by Kittichaisaree and denied by Wood, and Huang (A/CN.4/SR.3253, p. 11), "(…) according to international case law, the following elements needed to be investigated: the extent to which the treaty had been ratified, acceded to and accepted by states. Whether any of the states parties had withdrawn from or denounced the treaty (…)". The length of time the Forteau (A/CN.4/SR.3251, p. 6): "(…) bilateral treaties rarely gave rise to customary law, if only for statistical reasons: to reflect consensus among the nearly 200 states in the international community would require the existence of nearly 20,000 similar bilateral treaties (...) treaty had been in effect; the nature of the treaty provisions; and, lastly, the number of reservations (...)".

[57]Forteau (A/CN.4/SR.3251, p. 6): "(…) bilateral treaties rarely gave rise to customary law, if only for statistical reasons: to reflect consensus among the nearly 200 states in the international community would require the existence of nearly 20,000 similar bilateral treaties (…)".

[58]A/CN.4/SR.3254, p. 12.

[59]Sturma (A/CN.4/SR.3252, p. 13).

namely: the value of reserves when it has assumed customary value[60]; the codification of treaties that are not in force[61]; the treatment of a conventional provision as necessary to be "fundamentally norm-creating" as was also requested by the ICJ in the same sentence[62]; to consider the adherence of a form of practice to a treaty where the role of the practice is part of a subsequent practice to the treaty[63]; the role played by the preparatory works[64] and; the conventional provision which constitutes the existing custom in the relationship with the particular customary law[65]. The special Rapporteur Wood stated

[60]Park (A/CN.4/SR.3251, p. 9) and Hassouna (A/CN.4/SR.3252, p. 5).

[61]Park (A/CN.4/SR.3251, p. 9).

[62]Murase (A/CN.4/SR.3252, p. 3), Hassouna (A/CN.4/SR.3252, p. 5) and, Kolodkin (A/CN.4/SR.3254, p. 6).

[63]McRae (A/CN.4/SR.3253, p. 4) in particular: "(…) was becoming a party to a multilateral treaty more likely to constitute evidence of opinio juris than entering into successive bilateral treaties with the same content (…)".

[64]Hassouna (A/CN.4/SR.3252, p. 5).

[65]Gómez-Robledo (A/CN.4/SR.3254, p. 7) especially: "(...) in "fourth process", that means: "cases in which a treaty altered the meaning of an existing rule of customary law by establishing a new rule of international law that invalidated a previous practice that had been recognized as law (…)". The question arose as to whether the geographical distribution of states parties to a treaty could serve to determine the representative or general nature of the practice. When analysing the importance of the role of

that the need for a "fundamentally norm creating conventional provision", as well as the desirability of adding elements in the text of the conclusion, subject to the investigation of reservations and of not current treaties[66] are better placed within the commentary.

Perhaps for this reason the Drafting Committee has entitled part V "Significance of certain materials for the identification of customary international law" (Noute, 2013) underlining that treaties and resolutions constitute the material that is relevant for ascertaining the practice of a custom. The relative conclusion to the treaties is in practice examined[67] above all through the second

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treaties in the identification of customary international law, the Special Rapporteur seemed to refer only to general rules of customary international law, even though there was no indication to that effect in Draft Conclusion 12, which simply stated that a treaty provision could reflect or come to reflect a "rule of customary international law".

[66] A/CN.4/SR.3254, p. 12.

[67] "(…) If the expression "may reflect" is retained in order to prevent the conclusion that the treaty creates or constitutes definitive proof of a custom, "may come to reflect" is removed, since it is considered an expression referable more to the future development of customs rather than to the their current state of affairs, the expression "rule set forth in treaty" to "treaty provision" is also preferred, since a conventional rule could become customary regardless of being included in a single provision (…)", according to the Statement of the Chairman of the Drafting Committee, Mr.

paragraph which is reported in the corpus of the conclusions as stated by the special rapporteur in his third report who analyzed the automatic impossibility of arriving at the conclusion that the customary nature of a the law repeats the same provision in several treaties. In particular with the Draft Conclusion 11 [12]- Treaties a rule set forth in a treaty may reflect one of customary international law if it is established that the treaty: (a) codified a rule of customary international law existing at the time when the treaty was concluded; (b) has led to the crystallization of a rule of customary international law that had started to emerge prior to the conclusion of the treaty; or (c) has given rise to a general practice that is accepted as law (opinio juris) (Fitzmaurice, Elias, Merkouris, 2010), thus generating a new rule of customary international law. The fact that a rule is set forth in a number of treaties may, but does not necessarily, indicate that the treaty rule reflects a rule of customary international law (Noute, 2013).

This conclusive position just mentioned indicates that treaties can also have a probative nature (Gangale, 2018)[68] as is also

Mathias Forteau, 29 July 2015, pag. 11.

[68]Czech Republic (A/C.6/70/SR.20, paragraph 57), underlining: "(...) that particular probative importance should be recognized in treaties (and resolutions) that actually aimed at codifying or determining the progressive development of international law. While most of them were identifiable in the process of identifying customary international law, they were designed

explicitly underlined by ILC itself, i.e. that the treaty itself affects the generation of a custom[69]. For some states[70] the support on customs arises from the repetition of similar provisions in various treaties. Their representative[71] "(...) explicitly in agreement with the recognition of a greater probative value to multilateral treaties (...) asked the ILC to clarify how a custom can be formed starting from a treaty[72], in particular by suggesting certain criteria which

to become a law enforcement officer, and as such the 1963 Declaration of Legal Principles Governing the United States in the Exploration and Uses of Outer Space 1967 Outer Space Treaty, were part of a continuous process that could eventually generate rules of customary international law. (…)". Mexico (A/C.6/70/SR.21, para 47-48) declaring: "(...) its support for recognition of the three classical effects of the treaties on customary law" and Ireland (A/C.6/70/SR.23, paragraph 41) highlighting in particular that the evidence provided by a treaty could not in any case be considered yes definitive. "In and of themselves, treaties could neither create customary international law nor conclusively attest to it (…)".

[69]Czech Republic (A/C.6/70/SR.20, par. 57) and Ireland (A/C.6/70/SR.23, par. 41).

[70]Ireland (A/C.6/70/SR.23, par. 41) and South Corea (A/C.6/70/SR.23, par. 53).

[71]Romania (A/C.6/70/SR.21, par. 76).

[72]Poland (A/C.6/70/SR.21, par. 67) and, Romania (A/C.6/70/SR.21, par. 76) in particular: "(...) recognizing the lack of distance between the hypotheses of "crystallization" and "generation" (…)". Slovakia (A/C.6/70/SR.23, paragraph 8): "(…) having to deepen especially the role of the treaties not

should be taken into account (...)"[73]. Some states expressed, additionally, their support to the indication that the conventional provision should be "fundamentally creating norm"[74].

Thus the relationship between treaties and customs in the works of the ILC as well as on subsequent agreements and in subsequent practice identifies the relative agreements of practice

in force (…)". Indonesia (A/C.6/70/SR.23, para.27) invoking: "(...) a clarification about the "generation" hypothesis. Its delegation had no difficulty with subparagraphs (a) and (b), but doubted as the formulation of subparagraph (c), especially the phrase "by South Korea" (A/C.6/70/SR.23)" and South Korea (A/C.6/70/SR.23, paragraph 53): "(...) requesting a clarification in general on the probative function of the treaties: "The commentary should provide sufficient explanation regarding the criteria for determining the relevance of a treaty provision as evidence of a rule of customary international law (…)".

[73]Cina (A/C.6/70/SR.22, par. 69): "(...) in determining whether a treaty provision reflected a rule of customary international law, the criteria of objectivity and impartiality should be applied, and the investigation should be based strictly on general practice and opinio juris. Consideration should be given to factors such as the extent to which the treaty in question had been ratified, acceded to or accepted by states and whether a treaty provision had a universal character. In particular, non-party states should not arbitrarily determine which treaty provisions were rules of customary international law based on their narrow national interests. Such tactics of expediency were tantamount to utilitarianism or double standards (…)". Turkey (A/C.6/70/SR.22, par. 109), in particular: "(...) denying that the

in the conclusion that is direct, i.e. relevant to the relationship between treaties and customs as a subsequent behavior that abandons other arguments that are identified by Nolte during the "Treaties over time" (Waibel, 2011; Morisse-Schilbach, Halfmann, 2012). A conclusion that has been changed in subsequent treaty practice. It is a basis for a treaty change that sits in the same Commission during the 1964 Draft Convention on the Law of Treaties (Noute, 2013).

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distribution of the parties to the treaty can satisfy the requirement of general practice. Its delegation did not agree with the view expressed by some Commission members that the geographical distribution of the parties to a treaty could serve as evidence of the general character of practice. The approach should not be limited to a sole criterion. Iran A/C.6/70/SR.23, par. 63), highlighting: "(...) the inadequacy of state practice to a universal treaty, or the universality of one or more provisions of a non-universal treaty". In the United Nations Convention on the Law of the Sea, for example, the provisions concerning transit passage through straits used for international navigation were considered to represent progressive development of international law but not to constitute rules of customary international law, despite worldwide acceptance of the Convention. In that regard the practice of states not parties to the treaty was essential evidence. It was therefore necessary for the Commission to define the criteria to be met in order for such provisions to crystallize into customary international law that was binding on states that were not parties to those instruments.

[74]India (A/C.6/70/SR.21, par. 64), Cina (A/C.6/70/SR.22, par. 69) and Ireland (A/C.6/70/SR.23, par. 41).

It is clear that we must verify the “subsequent practice” from the unanimous agreement of the parties which is not interpreted as a simple modification of the treaty and which resides in the boundary between various effects where the practice distinguishes itself through the formation of custom, thus derogating from the extinction of the conventional law (Noute, 2013). The research continues regarding the conclusions and positions of the special rapporteur with respect to the interpretative value that belongs to the Drafting Committee who has chosen to place the topic under consideration in the sector of informal modification. Nolte's positions in his third report on later practice and treaty interpretation as well as customary practice (Abi-Saab, Keith, Marleau, Marquet, 2019) are arguments that vividly echo the works of the ILC which are relevant and subject of investigation also in the following paragraphs.

Interpretation, effects of treaties and subsequent practice

The special rapporteur Nolte in his own research tried to arrive at precise conclusions regarding the effects of interpretation of subsequent behaviors. We actually see this conclusion at the Drafting Committee[75] where the modifying effect of the

[75]Draft Conclusion 7-Possible effects of subsequent agreements and

subsequent practice is transferred and referred to in the third paragraph, whereas at the first phase it was referred to an ad hoc conclusion. We are talking about the coherence which includes the conclusion dealing with the effects of the subsequent conduct in a general way. The seventh conclusion proposed the useful arguments that bordered between extensive interpretation and relative modification (Buga, 2018).

The special rapporteur stated that: "(...) subsequent agreements and subsequent practice may specify a term, or confirm a broader meaning (also in the sense of guaranteeing a space of discretion for states)". Agreements and subsequent practice could specify the meaning of the treaty, not so much according to the degree of determination of a provision of the treaty, but according to the intention of the parties. The term "feasible precautions" contained in Article 57 of the Additional Protocol I of 1977 to the fourth Geneva Convention was specified by Article 3.10 of Protocol II of 1980 on mines and booby-traps. Such a definition

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subsequent practice in interpretation. Subsequent agreements and subsequent practice under articles 31 (3) and 32 can contribute to the clarification of the meaning of a treaty, in particular by narrowing or widening the range of possible interpretations, or by indicating a certain scope for the exercise of discretion which the treaty accords to the parties. The value of a subsequent agreement or subsequent practice as a means of interpretation may, inter alia, depend on their specificity.

subsequently adopted in practice by states. It also identified by the military manuals (Bellinger III, Vijay Padmanabhan, 2011; Nolte, 2013)[76].

We saw these clarifications in the decision of the Conference of State Parties (CSP) which qualified/specified such a definition as a "subsequent agreement". We also noticed it in the case of the fourth CSP of the WTO Framework Convention on tobacco control came into force on 27 February 2005. Subsequently in 2010 the states defined: "(...) some terms of the Convention and the objectives to be achieved with the imposition of disclosure obligations on tobacco manufacturers (...)"[77]. An example that

[76]Article 3.10 of Protocol I affirmes that: "All feasible precautions shall be taken to protect civilians from the effects of weapons to which this article applies. Feasible precautions are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations (...)".

[77]Article 10 of the Convention entitled: "Regulation of tobacco product disclosures" generically provides that each party shall, in accordance with its national law, adopt and implement effective legislative, executive, administrative or other measures requiring manufacturers and importers of tobacco products to disclose to governmental authorities information about the contents and emissions of tobacco products. Each party shall further adopt and implement effective measures for public disclosure of information about the toxic constituents of the tobacco products and the emissions that they may produce.

was also reported by Nolte in the second report of CSPs where the subsequent practice tries to limit the meaning of the content of a treaty, thus allowing its permission in the specific case of landing of charter planes in the Chicago Convention as is established by the mandatory practice.

In our opinion, these clarifications and/or specifications can also mean an extensive interpretation as depended upon Article 33 of the 1951 Refugee Convention which requires: "(...) an individual determination of refugee status, saying nothing with respect to situations of mass arrival of asylum seekers". In fact, the UNHCR has always applied an individual verification criterion even to situations of massive influx, although the preparatory work of the Convention thought otherwise. The extent of the immunity of consular vehicles from execution has also been specified by state practice, which tend to allow the removal of such vehicles if necessary from the roadway[78].

[78]It should be noted that Article 31.4 of the Vienna Convention on Consular Relations does not provide for such an exception: "(…) the consular premises, their furnishings, the property of the consular post and its means of transport shall be immune from any form of requisition for purposes of national defence or public utility. If expropriation is necessary for such purposes, all possible steps shall be taken to avoid impeding the performance of consular functions, and prompt, adequate and effective compensation shall be paid to the sending state (…)".

One of the effects of the treaties on subsequent practice is evident in the third report, particularly, for the Study Group, when determining the discretion that is granted in the states during the execution of the treaty. An example of this type dates back to the moment of the obligation to display the symbols of the Red Cross and Red Crescent, as enshrined in Article 12 of the second Additional Protocol of 1977 to the fourth Geneva Conventions[79]. It is a practice where the states subordinate this obligation to the discretion of the state thus allowing the risk assessment for the fulfillment of the case which exposes the personnel to a risk of armed attacks that have already been deliberated[80].

In this spirit Nolte mentioned to: "(...) the CSP of Convention of Ramsar of 2 February 1971 of new requirements for the designation of wetlands not initially foreseen in the treaty[81],

[79]The article states that: "(...) the distinctive emblem under the direction of the competent authority concerned, the distinctive emblem of the red cross, red crescent or red lion and sun on a white ground shall be displayed by medical and religious personnel and medical units, and on medical transports. It shall be respected in all circumstances. It shall not be used improperly (…)".

[80]Nolte mentions: "(...) in particular the response of the german government to a "parliamentary question of 9 April 2010" (…). "Rechtlicher Status des Sanitätspersonals der Bundeswehr in Afghanistan (…)".

[81]Convention on wetlands (Ramsar Convention) of international importance, article 2: "1. Each contracting party shall designate suitable wetlands within

requirements which however in state practice do not seem to be considered binding (leaving therefore room for discretion to the states)" (Nolte, 2013)[82]. In attributing the qualification of "persona non grata" pursuant to article 9 of the Vienna Convention on diplomatic relations seems to confirm the wide discretion that the provision grants[83].

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its territory for inclusion in a List of Wetlands of International Importance, hereinafter referred to as "the List" which is maintained by the bureau established under article 8. The boundaries of each wetland shall be precisely described and also delimited on a map and they may incorporate riparian and coastal zones adjacent to the wetlands, and islands or bodies of marine water deeper than six metres at low tide lying within the wetlands, especially where these have importance as waterfowl habitat (…)".

[82]In particular, the Australian Federal Court, in the case Minister for the Environment & Heritage v. Greentree (No. 2, 2004), stated that: "(...) the language of the CSPs recommendations does not suggest a binding effect (…)".

[83]The article affirmes that: "1. The receiving state may at any time and without having to explain its decision, notify the sending state that the head of the mission or any member of the diplomatic staff of the mission is persona non grata or that any other member of the staff of the mission is not acceptable. In any such case, the sending state shall, as appropriate, either recall the person concerned or terminate his functions with the mission. A person may be declared non grata or not acceptable before arriving in the territory of the receiving state (...)". According to Nolte: "(...) the practice shows that the severity of cases is often high, but sometimes the declaration

Also in the second report for the Commission Nolte repeated and took a cue from the jurisprudence of the ICJ trying to show as also in the first report for the Study Group the relative relationship between the subsequent attitude and other means of interpretation. In particular the ICJ used the practice as an element of a confirmatory nature. Just as Nolte followed the work of the Study Group that we saw in the first report (Nolte, 2013), he also tried to analyze the attitude of subsequent conduct with the ordinary context that is part of the object, with final objective the content of the treaty, remaining however intact and within the spirit that was signed. The following examples are indicators that seek to enhance the modus interpretandi of the subsequent practice as well as to make possibly the modification of a treaty. However, above all the final goal was to distinguish between the boundary of interpretation and the modification of a treaty (Buga, 2018).

Terms: Its ordinary meaning

The ordinary terms of a treaty, we can say, have to do with the ultimate goal of the subsequent conduct of the parties, i.e. calling for the confirmation or not of such an agreement. Already in the

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also occurs in less serious cases, such as that of driving in a state of Jewishness recorded in Canadian practice (…)".

first report, for the Study Group, Nolte had proposed four possible relationships related to subsequent conduct's interpretative criteria. This may have the effect of narrowing (specifying) or broadening (in an evolutionary sense) the ordinary meaning of a term used in the treaty, as in the case of the ICJ Opinion on Nuclear Weapons (Olvera, 2014)[84]. Such a conduct also acknowledges the possibility that later practice may not be deemed sufficient to support a broad interpretation of a treaty term (Galbraith, 2016). The absence of an explicit mention in the treaty is, however, rarely manifested in jurisprudence[85].

[84]In it it is judged: "(...) that the term "poisonous weapon" does not include nuclear weapons; however, there would be cases in which the conduct is so ambiguous that it cannot lead to such a specification, for example in the case of US Citizens in Morocco (France v. the United States). How frequent cases of evolutionary interpretation are those that involve international organizations, such as the 1989 opinion in the Mazilu case, which confirms the applicability of Article 22 of the UN Convention on Privileges and Immunities to individuals not regularly employed by the UN (also they can be qualified as experts if employed in a given task) (…)".

[85]As an example of the lack of extension of the ordinary meaning of the term despite a clear subsequent conduct in this sense, Nolte cites: "(...) the case of El Salvador v. Honduras, decided by the IGC in 1992, for which the court denies that the Treaty in question gives it jurisdiction over the question of the delimitation of the borders between the two states (…)".

As regards the subsequent conduct that was relative to a treaty, the provisions that influence the interpretation of this type of provision and/or, the value of the subsequent attitude which functions as an object referable to the same treaty, will have to be recognized[86]. Thus we evaluate the hypothesis that a term has an ambiguous nature given that the subsequent conduct can have and play a decisive role. Additionally, in this case Nolte underlined that: "(...) the subsequent conduct exercises a significant influence even when the term is clear, sometimes even going so far as to actually modify the treaty, as in cases involving the United Nations (...)" (Liakopoulos, 2019)[87].

[86]The example is the opinion of the ICJ "Constitution of the Maritime Safety Committee of the Inter-Governmental Safety Organization" (1960), in which the subsequent practice confirms the use of the tonnage criterion for the interpretation of the expression "largest ship owning nation".

[87]Examples of clear terms whose meaning: "(...) has been extended or in fact modified by subsequent conduct are in fact those contained in Articles 27 and 12 of the San Francisco Charter, based on the opinions of the ICJ in the Namibia case (Legal consequences for states of the continued presence of South-Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) (...)" and on the Legal consequences of building a wall in the occupied Palestinian territories, ICJ Reports of 9 July 2004, par. 108, ("(…) [t]he obligations erga omnes violated by Israel are the obligation to respect the right of the Palestinian people to self-determination, and certain of its obligations under international

In the second report for the ILC the relevant cases that are noted were already read in the first report for the Study Group. We particularly recall the United Nations Opinion on Certain Expenses where the ICJ made use of the later practice having as its objective to narrow the relative meaning of the term action that it extends to another one, i.e. expenses relating to the decision on US citizens in Morocco which had shown the variation of the noted practice which determines the specified effect in the case under examination[88].

(Follows): Treaty and its context

Nolte in his special report for the Study Group stated that: "(...) the "context" includes, according to Article 31.2 VCLT (Dörr, 2018), in addition to the preamble and annexes, also "agreements" and "other instruments" concluded "in connection" with the treaty (…)". This would be a category rarely used by the courts, and whose distinction with respect to the subsequent conduct would, in any case, merely be a temporal collocation. This is an interpretative element that operates in a structurally

humanitarian law"). Separate opinion of judge Kooijmans, in the Legal consequences of building a wall in the occupied Palestinian territories case, ICJ Reports of 9 July 2004, pp. 231, par. 40.

[88]A/CN.4/671, par. 23 e 24.

similar way, i.e. on the basis of the agreement of the parties. For the second report for the ILC, Nolte quoted his opinion in IMCO case of 8 June 1960 (Abass, 2014), in which he referred to the practice of using the tonnage criterion, in application of other provisions of the IMCO Convention, to define the category of "largest ship owning nation", referred to in article 28 of the same[89].

(Follows): Goal and object

In his first report for the Study Group, Nolte took into consideration, as we have already analyzed in the previous paragraphs, four possible relationships that link subsequent conduct to the interpretative criterion and, as we will now see, also with the object and purpose of the treatise. The subsequent conduct could directly contribute to the identification of the object and purpose, in case of "emergent purpose" according to Sir Gerald Fitzmaurice[90]. The scope of the subsequent conduct as

[89]A/CN.4/671, par. 25.

[90]A/CN.4/671, par. 181-182. In the ICJ jurisprudence, examples of subsequent conduct used to derive the object and purpose of the treaty are: Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway), 1988-1993. Land and maritime boundary (Cameroon v. Nigeria: Equatorial Guinea intervening) sentence of 10 October 2002,

an interpretative criterion could then be influenced by the character and content of the treaty, understood as an element of its object and purpose. However, the available jurisprudence is too scarce and too little specific to definitively support such a thesis (Villiger, 2011)[91].

As a possibility with controversial nature is the related subsequent conduct contributing to various and different objects with purposes that are not attributable to the treaty as we have seen in the Kasikili\Sedudu island case (Botswana v. Namibia) and as it turns out from the decision of the ICJ in 13 December 1999[92]. The following conduct is of help in specifying the limits

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parr. 248, 262-263. (1998). Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, ICJ Reports 1996, p. 803, par. 30; Behring international, Inc v. Islamic Iranian Air force and others, case n. 382, award of 21 June 1985, Iran-US, CTR 1985-I, p. 238ss, in which the court: "(...) denies that the US-Iran friendship treaty had as its object and purpose the establishment of peaceful relations between the two countries, also on the basis of the practice for which the treaty is not invoked in other cases of conflict between the two countries (...)".

[91]A/CN.4/671, par. 183. The thesis, attributed to Villiger: "(…) would also seem to be based on the fact that the character of the treaty, in addition to the number of parties, can be distinguished between "legislative" and "contractual", an opinion which no longer enjoys significant follow-up in internationalist doctrine (…)".

[92]ICJ, Reports 1888, p. 1045ss.

which concretely achieve the object and purposes of a treaty as are foreseen also in the case of disagreement of the parties. So Nolte tries to identify and clarify that the practice as such also makes recourse to the purposes and object of a treaty, extending however their application inappropriately, as we noted in the opinion of the ICJ in the Nuclear Weapons case[93].

In his second report for the ILC, the special rapporteur limited himself to referring only to some cases where the subsequent conduct helps to shed light on purposes and object of the treaty by giving them a meaning that is used in determinable

[93]In it, without referring to the object and the purpose: "(…) the ICJ considered nuclear weapons excluded from the scope of the 1925 Geneva Protocol, which speaks of "asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices", as it has been concretely implemented in the sense of applying itself only to such armaments (paragraph 55 of the opinion: "the terms have been understood, in state practice, in their ordinary sense as covering weapons whose prime, or even exclusive, effect it is poison or asphyxiate, his practice is clear, and the parties to those instruments have been referred to as nuclear weapons (...)". On the contrary: "(…) an area in which the subsequent conduct indicates the concrete limits of object and purpose is that of the conventions on the peaceful settlement of disputes, which require a special agreement for the attribution of jurisdiction to a specific international court: the object and purpose of the initial treaty would thus be defined by the subsequent agreement (…)".

interpretative means (Abass, 2014; Oude Elferinic, Henriksen, Veierud Busch, 2018)[94] and/or at the object and purposes that have a single and dispositive nature[95].

Reading the second report we notice a paragraph that refers to the specificity of the practice. Let's see international jurisprudence as it is used by the Study Group which agrees with the point that when a practice is precise it also respects the content. Purposes and object of the treaty thus interpret their own role respecting the means of interpretation as we can see with an exception in the European Court of Human Rights (ECtHR)[96].

By defining the subsequent practice, we verify the object and the evolution of national legislation as well as the positions of the states as noted through their own work and according to the objective of the European Convention of Human Rights (ECHR). We cannot interpret individual rights as applied by states seeing that they follow an interpretation that is translated according to the law coming from each individual state. Thus it is sufficient to verify the degree of integration that we see on some general

[94]ICJ, Maritime delimitation in the area between Greenland and Jan Mayen (Denmark v. Norway of 16 August 1988), Islamic Republic of Iran v. United States of America of 2 November 1992, and Cameroon v. Nigeria (A/CN.4/671, par. 28).

[95]As in the decision: Kasikili\Sedudu (A/CN.4/671, par. 29).

[96]A/CN.4/671, par. 39-41.

points of reference in various national legislations and as for example in the protection of rights that acquire value only through practices that are not successive but precise. The conclusions that refer to a precise and specific practice are those included in the eighth Conclusion where the Drafting Committee took into consideration addressing above all the practice and not the general theory of international law or just the jurisprudence.

Reformulation

The conclusions we have analyzed in the previous paragraphs gave the possibility to some members of the ILC to judge both positively and negatively the formulation formed in Articles 31

and 32 VCLT[97], even in an ambiguous way[98] (Bjorge, 2014)[99]. An indicative necessity is noted which expresses the interpretative effects of the agreements as well as the subsequent practice which cannot be other than that which prevails from an ordinary meaning in practice[100] or from the original intention of the

[97]Murphy (A/CN.4/SR.3205, p. 6): "(…) Draft Conclusion 7, paragraph 1, appeared to duplicate Draft Conclusion 11, paragraph 1, since both indicated that subsequent conduct could help to clarify the meaning of a treaty by narrowing or widening the range of possible interpretations. Paragraph 2 should be harmonized with Draft Conclusion 8, given that, as they currently stood, the two formulations made the value of subsequent practice as a means of interpretation conditional upon differing criteria (…)". Forteau (A/CN.4/SR.3205, p. 8): "(...) it was unclear what the difference was between the interpretative effect, value or scope-terms used in Draft Conclusions 7, 8 and 11-of subsequent practice, and he was of the view that those terms, which for the most part were equivalent, should be brought together in a single Draft Conclusion (…)".

[98]Park (A/CN.4/SR.3206, p. 3): In particular: "(…) he queried the contents of Draft Conclusion 7, given that the European Court of Human Rights was the only international court to limit itself to broad, comparative assessments of subsequent practice (...)" and Escobar Hernandez (A/CN.4/SR.3207, p. 4): "(…) in paragraph 2, while she had no preference for either "value" or "weight", it would be wise to clarify the meaning of the term chosen in the commentary (…)".

[99]See: Escobar Hernandez (A/CN.4/SR.3207, p. 4); Wood

parties[101], despite the fact that the use of precision and specification is questioned[102].

The Drafting Committee has completely reformulated the conclusion as was proposed by the Special Rapporteur in the first paragraph. He, moreover, moved the second, i.e. the specificity of practice, into the eighth conclusion, thus introducing the related discourse on the modification effect which is part of the conclusion number eleven[103].

(A/CN.4/SR.3208, p. 7), also recalling: "(...) that the use of subsidiary means of interpretation is not subject to conditions only when it is necessary to confirm the meaning of the treaty already achieved by other means (…)"; and Gevorgian, (A/CN.4/SR.3208, page 9).

[100]Hmoud (A/CN.4/SR.3208, p. 5).

[101]Gevorgian (A/CN.4/SR.3208, p. 9).

[102]Park (A/CN.4/SR.3206, p. 3) and Gevorgian (A/CN.4/SR.3208, p. 9: "(…) queried the choice of specificity as the criterion for determining the value of subsequent agreements and subsequent practice. Was that really the most important element in treaty interpretation? According to Draft Conclusion 8, on the other hand, the value of subsequent practice as a means of interpretation depended on the extent to which it was concordant, common and consistent (...)". See also the negative comment by Gevorgian: "(...) on the use of this triad of adjectives, in relation to the eighth conclusion, note 699 (…)".

[103]Statement of the Chairman of the Drafting Committee, Mr. Gilberto Vergne Saboia, 5 June 2014, p. 4.

The first paragraph has considered the treaties where subsequent practice can contribute a significant clarification. A greater emphasis is, in such a way, placed on interpretative means which actually operate in a combined manner according to Article 31 VCLT (Bjorge, 2014). In overall, we consider treaties, agreements and, subsequent practice as clarification means of the same meaning of interpretation[104].

The second paragraph confirms the nature of subsidiarity, according to ex article 32 that takes up a certain distinction between the two forms of practice of a successive evolutionary nature. As regards the modifying effect, the object that takes part of the second paragraph of conclusion number 11 is moved and dedicated to the effects of the treaties in the subsequent practice[105]. In essence, this topic is evident in the next paragraph which refers to an analysis where the Drafting Committee tries to reformulate and the states on the other side make comments and analyze the third paragraph of Conclusion number seven[106].

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[104]A/CN.4/SR, p. 5: "(…) such conduct may serve not only to clarify the terms of the treaty but also other means of interpretation which are mentioned in article 31 (...)".

[105]Statement of the Chairman of the Drafting Committee, Mr. Gilberto Vergne Saboia, 5 June 2014, p. 6.

[106]Draft Conclusion 7-"Possible effects of subsequent agreements and subsequent practice in interpretation". Subsequent agreements and

Interpretation of treaties and subsequent practice. First report for the Study Group and modification of the subsequent practice

Conclusion number eleven[107] has to do with the modifying effects of the subsequent practice according to the special rapporteur. It is also integrated in the seventh part as we have seen in the previous paragraph. Additionally, this is a point of study according to the works of the Study Group and those offered by Nolte.

Indeed, the Study Group dedicated its work on the subsequent conduct of the parties and on the effects of modifying the content

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subsequent practice under article 31, paragraph 3, contribute, in their interaction with other means of interpretation, to the clarification of the meaning of a treaty. This may result in narrowing, widening, or otherwise determining the range of possible interpretations, including any scope for the exercise of discretion which the treaty accords to the parties. Subsequent practice under article 32 can also contribute to the clarification of the meaning of a treaty.

[107]Draft Conclusion 11-"Scope for interpretation by subsequent agreements and subsequent practice": The scope for interpretation by subsequent agreements or subsequent practice as authentic means of interpretation under article 31 (3) may be wide. It is presumed that the parties to a treaty, by a subsequent agreement or subsequent practice, intend to interpret the treaty, not to modify it. The possibility of modifying a treaty by subsequent practice of the parties has not been generally recognized.

of the treaty, as recognized by the jurisprudence of the ICJ and in particular in the Costa Rica v. Nicaragua case of 29 September 2005[108]. This is how the proposal of the Commission was formed introducing the article of the Convention, i.e. Article 38 of the 1966 Project, entitled: "Modification of treaties by subsequent practice". This noted in particular that: "(...) a treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions (...)".

As we know, at the Vienna Conference of 1968 there were many states that did not follow the "correct" way to modify its provisions, on the contrary they doubted proposing various reasons. Such as, for example, the need to follow the procedures that amend a treaty[109]; the prejudice of the risk of specificity and stability of a treaty according to the pacta sunt servanda principle[110], the procedures of a national constitutional nature[111];

[108]According to the sentence: (par. 64): "the subsequent practice of the parties, within the meaning of Article 31 (3) (b) of the Vienna Convention, can result in a departure from the original intent on the basis of a tacit agreement between the parties".

[109]A/CONF.39/11, p. 208, par. 63 (France).

[110]A/CONF.39/11, p. 210, par. 75 (Republic of Chile) p. 212, par. 35 (Uruguay).

[111]A/CONF.39/11, p. 208, par. 58 (Japan) par. 63 (Francia); p. 209, par. 68

the sufficiency of an article which is part of the interpretative effect of the subsequent practice[112]; the modifications and the risk that they can cause the relative agreements of the parties[113] and; the attitude of bodies that belong to a lower rank[114]. There are many arguments in favor of an article that have to do with the formal nature of international law[115]. These are: the relative support of jurisprudence[116], the real problems at national level that are not taken in consideration[117], the interpretation that presents itself as an insufficient method for the resolution of some types of conflicts as well as the real contrast with the principle pacta sunt servanda[118] and, the informal modification that is recognized as a principle, i.e. a rule of international law[119]. The special rapporteur Waldock with regard to the above positions, arguments just mentioned tried to highlight the absence

(Spain); p. 211, par. 21 (Colombia).

[112]A/CONF.39/11, p. 207, par. 57 (Finland).

[113]A/CONF.39/11, p. 208, par. 73 (Spain).

[114]A/CONF.39/11, p. 209, par. 68 (Spain); p. 211, par. 6 (United States).

[115]A/CONF.39/11, p. 211, par. 9 (Iraq) par. 22 (Italy).

[116]A/CONF.39/11, p. 214, par. 51 (Argentina).

[117]A/CONF.39/11, p. 214, par. 57 (Sir Humphrey Waldock).

[118]A/CONF.39/11, p. 214, par. 51 (Argentine); p. 123, par. 49 (Democratic Campuchea).

[119]A/CONF.39/11, p. 211, par. 22 (Italia), p. 212, par. 33 (Austria); p. 213, par. 48 (Israel); p. 214, par. 51 (Argentine).

of the conflict between the principle pacta sunt servanda and the recognition of any other case that modifies the good faith and the problems arising from the national constitutional order[120]. Accordingly, a proposal to eliminate the relative article which favors the majority of the states was raised at the Conference[121].

(Follows): Relevant cases

When we speak of practice in the majority of the times we mean the jurisprudence, especially in our case, that of the ILC. Nolte did not express himself in a precise way for the subsequent practice which actually modified a treaty but he took into consideration in his first report for the Study Group the analysis of some cases suggesting that in reality this actually happened. The opinion on Namibia of 1971, in which the ICJ recognized that the provision of Article 27 of the San Francisco Charter, which requires the "concurrent" vote of all permanent members of the Security Council for questions of a non-procedural nature, had not prevented the approval of certain non-procedural resolutions despite the abstention of some permanent members of the latter[122] . In the opinion on the Construction of a Wall in

[120]A/CONF.39/11, p. 214ss.

[121]To be precise 53 votes in favor, 15 against and 26 states abstained.

[122]Opinion in the case of Namibia (1971), par. 22: "(…) however, the

Palestine, the ICJ recognized that, despite Article 12 of the UN Charter (Liakopoulos, 2017), the Security Council with increasing frequency and the General Assembly are simultaneously dealing with the same issue concerning the maintenance of international peace and security (Tanaka, 2018)[123]. Also in the ruling of the Temple of Preah Vihear, the

proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions. By abstaining, a member does not signify its objection to the approval of what is being proposed; in order to prevent the adoption of a resolution requiring unanimity of the permanent members, a permanent member has only to cast a negative vote. This procedure followed by the Security Council, which has continued unchanged after the amendment in 1965 of Article 27 of the Charter, has been generally accepted by Members of the United Nations and evidences a general practice of that Organization (…)".

[123]Opinion of legal consequences of the construction of wall in the occupaied palestinian territory of 9 July 2004, p. 149, par. 27: "(…) as regards the practice of the United Nations, both the General Assembly and the lsecurity Council initially interpreted and applied article 12 to the effect that the Assembly could not make a recommendation on a question concerning the maintenance of international peace and security while the matter remained on the Council's agenda. (…) This interpretation of article

ICJ recognized the border between Cambodia and Thailand (Abass, 2014) on the basis of a map distributed unilaterally by the French authorities administering Cambodia, in apparent discrepancy (although the Court left the question open) with respect to the border line indicated in a treaty concluded between France and Siam in 1908 (Liakopoulos, 2019)[124].

In this spirit we also take into consideration the jurisprudence that is used by the arbitrations which many times try to confirm the informal modification of the treaty based on the subsequent practice. Thus we recall the case of the dispute between Ethiopia and Eritrea, where the court recognized: "(...) that the treaty on the borders between the two countries had actually been modified by the subsequent conduct of the parties[125], and in the Taba arbitration the judges declared, at least in the abstract, that in the

12 has evolved subsequently. (...) the court notes that there has been an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security (...). It is often the case that, while the Security Council has tended to focus on the aspects of such matters related to international peace and security, the General Assembly has taken a broader view, considering also their humanitarian, social and economic aspects (...)".

[124]ICJ, Preliminary exceptions in the Temple of Preah Vihear case (Cambodia v. Thailand), ICJ Reports, 1961, par. 33.

[125]Sentence of 13 April 2002, in particular see: p. 110ss.

event of a conflict between a treaty on borders and the line drawn concretely by some pillars, it would have been the latter that would prevail (except then denying that such a contrast existed in concrete terms) (...)"[126]. Thus according to Nolte we can understand that a term is ambiguous and not precise, if the subsequent conduct of the parties causes an effect that seeks to modify the treaty and that this effect produces a specific language and a precise meaning, i.e. seeks to contribute to the specificity of the required meaning.

(Follows): Treaties susceptible to informal changes

Treaties can tolerate some modifications informally. We are talking about treaties establishing international organizations as we have seen in the case of the opinion of the ICJ in the Namibia for a construction of a wall in the occupied Palestinian Territory case of 19 December 2003 (Roberts, Araujo, 2004; Watson, 2005 ; Kretzmer, 2005; Pomerance, 2005; Folk, 2005). The ICJ has followed this position. However, in this case Nolte was against Fitzmaurice's thesis (Liakopoulos, 2019)[127] underlining that: "(...) this modifying effect would be limited to the way in

[126]Sentence of 29 September 1988 in controversy between Egypt and Israel.

[127]Expressed in his dissenting opinion in the opinion on Namibia, in particular p. 282, par. 94.

which the powers of the organ are exercised, since it cannot go so far as to modify or add other powers to the organization". On the other hand, according to the author of the report, some decisions of the ICJ expressly recognize the possibility of substantial effects on the structure and powers of the organization[128]. So, it would not be possible to deny a particular role of subsequent conduct in the evolution of international organizations (Brölmann, 2012), as also emerges from Article 2.1.j VCLT (Noute, 2013) between states and international organizations and between international organizations, as it identifies between the "rules of the organization" also the "established practice" of the latter[129].

[128]This would be the opinion on the reparation of damages suffered at the service of the United Nations (1949) ("(…) the rights and duties of an entity such as the organization must depend upon its use and function as specified or implied in its constituent documents and developed in practice (...)"), the one on Nuclear Weapons (1996): "(...) (where the application of Article 31.3.b) of the Vienna Convention to the practice of organization would represent, according to Nolte, the demonstration of the recognition, at least in the abstract, of the possibility of influence of practice on the powers of the organization and decision in Cameroon v. Nigeria (Preliminary Objections, 1998, par. 70): (…) boundaries in the region on the basis of the agreements and treaties referred to in the experts' report of November 1984 (…)".

[129]Nolte also affirms that: "(...) Fitzmaurice, in its dissenting opinion in the

Within this context we can also consider the case of treaties that need modifications that according to the jurisprudence have to do with the delimitation of the borders. We recall the case of the dispute between Burkina Faso and Mali, where the ICJ took into consideration: "(…) the principle according to which border disputes should be decided, i.e. assuming the priority of the title but admitting that the principle of effectiveness can win this presumption (Dixon, McCorqodale, Williams, 2011; Walter, Von Ungern-Sternberg, Abushov, 2014)[130]. This is what happend, due to the acquiescence (Liakopoulos, 2022) of a state to acts on sovereignty of others, precisely in the decisions Cameroon v. Nigeria (Bekker, 2003)[131] and to Temple of Preah Vihear

opinion on Namibia, does not totally rule out that long-term practice can be equated with a tacit agreement with amending effects, but the presumption would be contrary, especially when the Treaty provides for an express (…)". According to Nolte: "(…) a more in-depth investigation should in any case take into account the distinction between the organization's practice and its members' practices (…)".

[130]Burkina Faso v. Republic of Mali of 22 December 1986), p. 586, par. 63: "(…) where the act does not correspond to the law, where the territory which is the subject of the dispute is effectively administered by a State other than the one possessing the legal title, reference should be given to the holder of the title. In the event that the effectivité does not co-exist with any legal title, it must invariably be taken into consideration (...)".

[131]Cameroon v. Nigeria of 10 October 2002, p. 353, par. 68: "(…) the

(Liakopoulos, 2019)[132]. Nolte thus underlined that: "(...) in many treaties on borders an ambiguity persists due to the need to concretely mark the border, and the Court seems to distinguish between treaties which define a border clearly but without marking it more susceptible to informal modification, and those which directly fix the demarcation line[133]. The stability requirements that inform a border treaty would determine a preference for a contemporary (rather than evolutionary) interpretation, and should be presumed violated (rather than modified) when a state does not react to a conduct of a neighboring state which is detrimental to its sovereignty. Such considerations could hardly be compatible with the affirmation that treaties on borders are likely to be modified through subsequent practice. It is not a coincidence that one assumes a cautious attitude, refraining from finding in the available

conduct of Cameroon in that territory has pertinence only for the question of whether it acquiesced in the establishment of a change in treaty title, which cannot be wholly precluded as a possibility in law (...)".

[132]ICJ, Reports 1962, p. 6, case Cambodia v. Thailand of 15 June 1962.

[133]Cameroon v. Nigeria (2002), p. 351, par. 64: "(…) now that [the court] has made its findings that the frontier in Lake Chad was delimited long before the work of the LCBC began, it necessarily follows that any Nigerian effectiveness are indeed to be evaluated for their legal consequences as acts contra legem (…)".

jurisprudence an express recognition of the informal modification. In our opinion, Nolte has taken into consideration in his own analyzes that the founding treaties of international organizations in relation to subsequent practice have a significant character because they try to dynamically deal with objects, effects and, purposes where states are called to react to concrete situations which are hardly external in advance. A treaty highlights thus the precise stabilization of a realization which passes through the subsequent practice of the parties which are bordering and not for all the other states.

The jurisprudence admits an effect of a modifying nature where in practice it follows the stability of a treaty as an objective and within the limits that recognize acquiescence as an effect of a state which renounces the relative invocation in terms of an agreement and in the face of the conduct that causes slight "damage" to the counterparty (Liakopoulos, 2022). This is how Nolte aligns a (balance) thinking that has to do with the stability not so much of the effect but of the clarification of the treaty and through the subsequent practice thus reaching the circumstances of each case. We recall the ICJ the Kasikili\Sedudu case which made us think the criterion which is based on the interpretation of the text and the circumstances are such that they are excessive in nature thus attributing to a decision which has the effect of a

compromise which makes it possible to modify the informal nature of treatises that are relevant and analyze topics that we have to do with borders (Noute, 2013)[134].

Apart from the jurisprudence that we have noted so far and from each treaty with its own objective, there are also other examples of modification of the subsequent practice such as for example in the case of arbitrators as noted in the sentence on the Air Services between the United States and France, dating back to 1963 (therefore prior to the VCLT)[135]. Also in this case Nolte stated

[134]ICJ, Kasiliki/Sedudu Island (Botswana v. Namibia) judgment of 13 December 1999, ICJ Reports 1999, pp. 98: "(…) the subsequent conduct was that of an indigenous tribe of Namibia, and the court denied that it could constitute subsequent relevant practice to the effects of a treaty change. It was therefore a very special case that also affected the problem of attributing this conduct to the state (...)" and according to Nolte: "(…) it would therefore be inappropriate to draw conclusions from this case of a general nature concerning the subordination of the scope of the subsequent practice with respect to the a treaty on borders (…)".

[135]In it, the arbitral court: "(...) recognized that the conduct of some US companies that also served destinations not originally planned constituted, rather than a reinterpretation of the treaty, a modification of the same (…) this course of conduct may, in fact, be taken into account not merely as a means useful for interpreting the agreement, but also as something more: that is, as a possible source of a subsequent modification, arising out of certain actions or certain attitudes, having a bearing on the juridical situation of the parties and on the rights that each of them could properly claim (...)".

that: “(...) the fact that the courts usually recognize this possibility in the abstract, therefore not with express reference only to the aforementioned categories, as well as the distance that separates the latter, would be sufficient arguments to affirm that any treaty is informally modifiable (...) nevertheless conceded that some treaties might not be very susceptible to a procedure of this type, depending on their character or the presence of an explicit amendment mechanism (...)” (Nolte, 2013).

Evolutionary interpretation: Desuetude/obsolescence

We have already talked about the modification of the treaties in the previous paragraphs. We continue with another case of modification which concerns that of informal modification which is carried out through a practice which is tacit between the parties and which constitutes the desuetude of the treaty. In this case Nolte took into consideration the positions of Fitzmaurice who maintained that: “(...) this effect cannot be produced by the mere passage of time or by the non-application of the treaty for a long period”. The position expressed by the ILC in 1966, for which the legal basis of this cause for termination of the treaty lies in the common will of the parties, even if it can be inferred from their subsequent conduct[136]. To prove this will, the absence of

[136]Yearbook of the Commission, 1966, Vol. II, p. 237: “while obsolescence”

new accessions to the treaty or the modification of a certain practice on the application of reservations would not be suffice, and the evidential threshold to be satisfied before concretely admitting the obsolescence of a treaty by means of the subsequent practice should be considered particularly high[137].
The subsequent practice which modified the effects of the treaties according to the interpretation was recognized by article 31.3.b, that is to say according to the boundary between the two cases which in reality seemed to be blurred. Also in this case the ICJ clarified and distinguished according to the opinion of Nolte that: "(...) it is useful to try to identify such a parameter in the abstract". It would rather be preferable to let this qualification, when necessary, respond to the circumstances of the case concret. It would be necessary to verify how much space it is possible to grant to an interpretation of an evolutionary type. The greater the space, the less is needed to recognize an informal modification,

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or "desuetude" may be a factual cause of the termination of a treaty, the legal basis of such termination, when it happens from their conduct in relation to the treaty (...)". The position is echoed in the dissenting opinion attached to the decision on nuclear tests (Australia v. France, 1974), by the judges Bengzon, Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock.

[137]These are the two eventualities expressly identified in the dissenting opinion in Australia v. France.

as evidenced by the decision on Costa Rica v. Nicaragua[138]. This is an evolutionary interpretation that we have also seen in previous paragraphs[139].

It is a trend that recognizes the nature of science of an interpretation that identifies the main instrument of interpretation according to Articles 31-33VCLT (Hollis, 2020) as grounds that hold the interpretation of international law in a non-static, specific form. The role played in the interpretation of the conventional rules emerge from a practice that takes the attitude of the guidelines within an interpretative conduction where the treaty is configured in a circular way since it rotates, circulates with two elements. On the one hand the content, text, object and purposes of the treaty. On the other hand, the meaning of a literal nature that represents the starting point of any type of interpretation that reconstructs according to Article 31 VCLT the various elements of the object and purposes of the treaty. The object and purposes of a treaty are not given but constitute part of

[138]Where the ICJ could: "(…) refrain from pronouncing on the successful modification of the treaty precisely because of the possibility of (limited to) performing an "evolutionary interpretation of the term" trade (…)".

[139]In particular, in point II.3, dedicated to conclusions 2 and 3 as lastly formulated by the Drafting Committee, specifically related to the authentic (and evolutionary) interpretative function of subsequent agreements and practices.

the interpretation phase (Noute, 2013). It is a precise, rigid consequence of the hermeneutic criteria of Article 31 VCLT (Noute, 2013) which constitutes a starting point of the activity to an interpretation that is sufficient at first sight. On the other hand, the hierarchy of hermeneutical criteria varies in the ways of interpretation according to the normative or contractual nature of the treaty. Thus a distinction emerges through law and contract treaties which by now according to contemporary international law have an outdated nature and are not attentive to the schools of internationalists since they are based more on self contained regimes. A distinction that takes into consideration the hermeneutical criteria that seek to outline the interpretation of each treaty in a discretionary way (Noute, 2013).

The modus interpretandi is an art that conceives not only its scientific but also its artistic nature in terms of the final result. We can say that the position, where the application of the rules of Articles 31-33 VCLT (Hollis, 2020) can lead to the identification of a treaty with regards to its objective, is erroneous. Why is this happening? Perhaps because the objective/subjective distinction is now unacceptable. Another problem is the identification of the certainty of the objective meaning of the treatise which in a particular way results from the ordinary meaning of each term. One of the problems of the interpretative theory of international

treaty law is the existence of the rule that is in agreement with the linguistic versions as sanctioned by Article 33 VCLT (Noute, 2013). Thus all the linguistic versions in which a treaty was created are absolutely authentics.

This type of interpretation has a dynamic, strong nature. In practice, this rule is simplified and uses the elimination of various ambiguities as an auxiliary mean. The interpreter elaborates mainly on the English, French version and at the moment of an ambiguity in the text of an expression. This means that an “appropriate” word resolves the ambiguous character according to the objective of the treaty. The rule of Article 33 VCLT creates some indifferent problems. Problems that are highlighted in various studies especially of comparative law that have to do with the interpretation and translation of international law of contemporary treaties. Translation is a presumption where the texts are valid in the original form which is often missing. The main problem in the presence of language versions is the bona fides absence on the original font. Originality that has to do with the interpretation of the linguistic versions by the interpreter himself. The same objective and purpose of a treaty cannot be interpreted starting only from the linguistic version. For the interpreter, knowledge of the different languages is necessary during the negotiations and for the drafting of a treaty in the

original language which always dates back to the English language. It is a position that runs counter to the spirit of Article 33 VCLT (Noute, 2013). Even the distinction between the native language and the used one encounters a series of difficulties in approaching a language that is not one's own. The similarities and parallels of the different interpretative disciplines superimpose hermeneutical criteria which are reserved for the interpretation of a treaty and which are foreseen for the contract and/or for the law. The other normative sources are compared to law and contract which adapt on the basis of compatibility criteria.

Treaty amendment and subsequent practice in the second report for the Commission

It is important to clarify the sources of obligations as a problem of the need for clarification for the modification of each treaty. Informal modification for the original treaty is a subsequent practice that is viewed as an autonomous source that prevails over the hypothesis that also recurs from the same international jurisprudence[140]. Also in this case Nolte stated that looking at the

[140]Nolte cites: "(...) two arbitration awards that take opposite positions: the first is that on the Commissions at Heathrow Airport (1992), in which the judges denied that they would have jurisdiction if they had to acknowledge

concrete case, in particular at the "willingness of the parties to establish an independent source of obligations through subsequent practice", should be presumed, for example, when the addition to the treaty of new elements or significant modifications to its object and purpose (as opposed to a mere clarification or adaptation of the terms of the treaty) are important on the question of informal modification of the treaty and are noticed as the last point of its second report, proposing a conclusion concerning the limits of the "scope" of subsequent agreements and of subsequent practices[141]. The considerations contained in the first introductory report analyze the relationship between the means referred to in Article 31.3.a) and b) VCLT (Bjorge, 2013; Dörr, 2018) and the possible procedures expressly provided for by the treaty[142]. It is reasonable to assume that the willingness of the parties to negotiate similar procedures determines a priority of these compared to other informal modalities, but sometimes the jurisprudence has not gone in this

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the informal change of the treaty in question through a memorandum of Understanding; on the contrary, in Air Services between the United States and France (1963) the judges recognized the jurisdiction to decide on the obligations of the parties even when modified by the subsequent practice.

[141]A/CN.4/671, par. 112, entitled: "Scope for interpretation by subsequent agreements and subsequent practice (…)".

[142]A/CN.4/671, par. 113-114.

direction, recognizing that a practice, if present, cannot be ignored, as for example in the two treaties on borders for the establishment of a special commission for concrete demarcation[143]. Therefore, interpreting the treaty is important to establish to what extent such procedures exclude recourse to the informal ways of subsequent conduct[144].

Within this context we recall the case of the decision of the WTO Appellate Body in the EC-Chicken Cuts case (Melischek, 2013; May, 2017)[145] where it was stated: "(...) that the interpretative

[143]That is, the ICJ in the Temple of Preah Vihear (1962) and the arbitration court in the Beagle Channel (1977), which recognized that: "(...) the non-implementation of these procedures cannot mean the illegitimacy of a delimitation of the boundaries through the subsequent practice (…)".

[144]In Beagle Channel (1977), the arbitral court: "(...) rejects the Argentine argument that the terms of the treaty expressly excluded any effect from unilateral practice (paragraph 174)". It is clear that the treaty is controlling, but the Critical issue is what the Treaty is about? This is a pending arbitration in the event of a dispute, the boundary cannot be changed by the party. According to Nolte, it must also be inferred that if the presence of a procedure for the amendment of the treaty prevents an informal change, the possibility of using the subsequent practice for interpretation purposes is not excluded.

[145]Appellate Body report, European Communities-Customs Classification of Frozen Boneless Chicken Cuts (EC-Chicken Classification), WT/DS269/AB/R of 27 September 2005, par. 238 and Appellate Body Report, Japan-Alcoholic Beverages case II, Report of the Appellate Body,

powers described by Article IX:2 of the treaty establishing the WTO do not constitute lex specialis with respect to the interpretation rules identified by the Vienna Convention". Additionally, the Methanex decision[146], in the milieu of NAFTA, would thus be seen as confirmation of the fact that a specific conventional provision would not exclude the value of a subsequent agreement or of a subsequent practice on the basis of these general rules (Kirkman, 2002; Weler, 2002; Fauchald, 2008; Kaufmamnn-Kohler, 2011)[147].

The main point is that of analysis and modification between treaties or subsequent practice which thus broadens the survey carried out in the first and third report for the Study Group, combining the jurisprudence which is integrated in the second. The limit between the cases is a starting point as we can see in the decision of Costa Rica v. Nicaragua case, i.e. as a statement that needs confirmatory assurance that the ICJ recognizes the

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WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R (Oct. 4, 1996).

[146]Case Methanex Corporation v. United States of America of 1976.

[147]NAFTA: Metalclad Corporation v. Mexico, ICSID Case No. ARB(AF)/97/1, Award, 30.8.2000, paras. 100 et seq.; SD Myers Incorporated v. Canada, Ad Hoc Tribunal (UNCITRAL), First Partial Sentence and Separate Opinion, 13.11.2000, paras. 224 et seq.; Pope & Talbot Incorporated v. Canada, Ad Hoc Tribunal (UNCITRAL), Sentence on the Merits of Phase 2, 10.4.2001, paras. 110ss.

possibility of an informal treaty change[148].

Subsequent practice and modifying effect

As regards the subsequent practice and the possible modifying effect, the special rapporteur took into consideration Article 38 of the draft of VCLT[149] and the related jurisprudence of the ICJ which implicitly recognized the informal modification thus respecting the first and the second report for the Study Group and the positions of Nolte who in this case denied that the jurisprudence follows a definitive answer which, as highlighted by the ICJ, uses forms that suggest a broad interpretation that is difficult to reconcile with the literal content of the treaty (Noute,

[148]A/CN.4/671, par. 115. See in particular note 1792 for the citation of the ICJ, which is also reported here for convenience: "(…) subsequent practice of the parties, within the meaning of Article 31 (3) (b) of the Vienna Convention, can result in a According to the special rapporteur, this sentence could be understood simply as referring to the role of the subsequent practice in order to demonstrate that the alleged intention of the parties is to give a term a meaning capable of evolving over time, as recognized in the third conclusion (...)".

[149]A/CN.4/671, par. 118-123, "(…) with the arguments of the states for and against, recalling that in any case the doctrine denies that the elimination of the article results in the general impossibility, under general international law, that the informal change takes place (…)".

2013)[150]. Distinguishing between "categories" that are susceptible to informal modification as in the first report for the Study Group, the Special Rapporteur focused on the jurisprudence and on especially arbitration[151]. In this spirit, the EC-Bananas III decision in the context of the WTO[152], is recalled. The Appellate Body stated on this that: "(…) a modification of the treaty cannot constitute its "application"[153].

[150]A/CN.4/671, par. 124-129. As indicated in point II.2.1.1 and II.2.1.2, in addition to Costa Rica v. Nicaragua, two opinions on the functioning of the United Nations (Namibia and the Wall in Palestine) by Nolte.

[151]A/CN.4/671, par. 130-131, or the praises Eritrea v. Ethiopia (above, note 1810) and USA-France Air Services (above, note 1826), already mentioned in the first introductory report (see above in point II.2.1.1). Here Nolte added: "(...) the indication that the former was qualified as "isolated exception", and reiterated that the second precedes the Vienna Convention (…)".

[152]A/CN.4/671, par. 132.

[153]European Communities-Regime for the Importation, Sale and Distribution of Bananas (for the second appeal in art. 21.5, see the report of Appellate Body of 26 November 2008, WT/DS27/AB/RW2/ECU and WT/DS27/AB/RW/USA, Report of Panel of 7 April 2008, WT/DS27/RW2/ECU): "(…) the problem was whether the granting of an "exemption" by the Ministerial Conference with respect to an agreement ceased at the time of the exemption itself could be considered a prolongation of the terms of validity of the agreement as a later practice. If the Panel recognized the agreement of the parties and the identity of content, the

In Nolte's opinion a consequence of the provision of Article 3.2 of the DSU is that "prevents the organs of the DSB from adding or subtracting rights or obligations to the parties" (Liakopoulos, 2011a)[154]. Article IX.2 of the agreement provides for the possibility for the parties to determine an authentic interpretation with a majority of three quarters of the Member States (and provided that this does not prejudice the amendment procedure)[155]. Finally, nor does the DSB clarify the relationship between such provision and those of the Vienna Convention, nor is the jurisprudence of the Appellate Body particularly clear on

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Appellate Body highlighted the different nature of an "exemption" and the modifying effect that it would have had on the agreement if it had still been in force (…)".

[154]Article 3.2 of Dispute Settlement Understanding states that: "(…) the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements (...)".

[155]Article IX, par. 2 of WTO Agreement: "(…) the Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. In the case of an interpretation of a Multilateral Trade Agreement (…)".

the point[156].

In this spirit we recall the jurisprudence coming from the ECtHR[157] which characterizes the recognition of a modification stating that: "(...) would therefore not seem to be appropriate to derive a general rule of the law of treaties solely from precedents which concern a distinguishable type of treaty for which subsequent practice may play a specific role (…)" (Timmermans, 2013; Harris, O'Boyle, Warbrick, 2014; Rainey, Wicks, Ovey, 2017; Costa, 2017; Seibert-Fohr, Villiger, 2017)[158]. Thus we note the two sentences on the delimitation of borders (Temple Preah Viehar and Cameroon v. Nigeria) which are referred to in the first introductory report, stating that: "(...) the Court has so far not

[156]In Japan-Alcoholic Beverages II is affirmed that Article IX: 2 "(…) excluded the possibility of using the subsequent conduct ex 31.3 of the Vienna Convention as a further means of interpretation, while in EC-Chicken Cuts it was excluded that there existed a specialty relationship between the two provisions, indeed in EC-Bananas III a certain affinity is admitted (…)".

[157]A/CN.4/671, par. 133-135.

[158]ECtHR: Soering v. United Kingdom of 7 July 1989; Al-Dulimi and Montana Management Inc. v. Switzerland of 21 June 2016, para. 145; Hämäläinen v. Finland of 16 July 2014, at para. 67; S.H. and others v. Austria of 3 November 2011, par. 94; Paposhvili v. Belgium of 13 December 2016, par. 182; Nada v. Switzerland of 12 September 2012, par. 195; Republican Party of Russia v. Russia of 11 April 2011, par. 126.

explicitly recognized that such an effect has actually been produced in a specific case (...) informally of the ECHR by means of the subsequent practice of the states parties (...)" (Liakopoulos, 2019).

Such an acknowledgment is referred to in Soering v. United Kingdom case, in which the ECtHR stated that: "(…) the subsequent practice of states to repeal the death penalty in their legal systems could have had the effect of modifying article two on the right to life (which expressly allows the capital by way of exception). Then, the removal of a limit to an evolutionary interpretation of article three (Djeffal, 2015), prohibits inhuman and degrading treatments, in the sense of prohibiting the transfer of an individual to a state in which he seriously risked the death penalty. Lastly, the signing of Protocol 6 on the abolition of the death penalty in peacetime testified to the willingness of the states to amend the ECHR in a formal way (thus excluding in practice a modifying effect of the subsequent practice)[159].

[159]Soering v. United Kingdom of 7 July 1989, par. 103: "(…) subsequent practice in national penal policy, in the form of a generalised abolition of capital punishment, could be taken as establishing the agreement of the contracting states to abrogate the exception provided for under article 2 par. 1 (art. 2-1) and hence to remove a textual limit on the scope for evolutive interpretation of article 3. Protocol No. 6 (P6), as a subsequent written agreement, shows that the intention of the Contracting Parties as recently as

In the Öcalan v. Turkey case, the ECtHR recognized: "(...) the possibility that subsequent practice could modify the treaty, and indeed affirmed that this would happen precisely with the abolition of the death penalty in peacetime, in the sense that in this way the exception contained in article two would have been removed and, consequently, it would be possible to interpret article three in the way seen (...) the death penalty in wartime, with respect to the abolition of which, again, the states demonstrated that they had chosen the path of formal modification through another Protocol to the ECHR, the thirteenth (...)"[160].

1983 was to adopt the normal method of amendment of the text in order to introduce a new obligation to abolish capital punishment in time of peace and, what is more, to do so by an optional instrument allowing each State to choose the moment when to undertake such an engagement. In these conditions, notwithstanding the special character of the Convention (…), article 3 (art. 3) cannot be interpreted as generally prohibiting the death penalty (…)".

[160]ECtHR, Öcalan v. Turkey of 12 May 2005, par. 163: "(…) in assessing whether a given treatment or punishment is to be regarded as inhuman or degrading for the purposes of article 3 it cannot but be influenced by the developments and commonly accepted standards in the penal policy of the Member States of the Council of Europe in this field (…) the concepts of inhuman and degrading treatment and punishment have evolved considerably since the Convention came into force in 1953 and indeed since

The acknowledgment of the modifying effect found expression in the Al-Saadoon & Mufdhi v. The United Kingdom case of 2 March 2010 (Edwards, 2010; Teitgen, Colly, 2013; Grabenwarter, 2014; Marchadier, 2014; Schabas, 2015; Aznar, Fouter, 2016; De Weck, 2016), in which the ECtHR was called to decide if the transfer of an Iraqi prisoner from the United

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the court's judgment in Soering in 1989. (...) equally the court observes that the legal position as regards the death penalty has undergone a considerable evolution since Soering was decided. The de facto abolition noted in that case in respect of twenty-two contracting states in 1989 has developed into a de jure abolition in forty-three of the forty-four contracting states and a moratorium in the remaining state that has not yet abolished the penalty, namely Russia. This almost complete abandonment of the death penalty in times of peace in Europe is reflected in the fact that all the contracting states have signed Protocol No. 6 and forty-one states have ratified it, that is to say, all except Turkey, Armenia and Russia. It is further reflected in the policy of the Council of Europe, which requires that new Member States undertake to abolish capital punishment as a condition of their admission into the organisation. As a result of these developments the territories encompassed by Member States of the Council of Europe have become a zone free of capital punishment (...) such a marked development could now be taken as signalling the agreement of the Contrto abrogate, or at the very least to modify, the second sentence of article 2 par. 1, particularly when regard is had to the fact that all contracting states have now signed Protocol No. 6 and that it has been ratified by forty-one states. It may be questioned whether it is necessary to await ratification of Protocol No. 6 by the three

Kingdom to a state not party to the ECHR, Iraq, constituted inhuman or degrading treatment pursuant to article three of the Convention, since in the country of destination he would actually risked the death penalty. Taking up the line of reasoning already expressed in Soering and Öcalan, therefore states that article two must now be considered amended by the subsequent practice of the parties in the sense of abolishing the death penalty, therefore it would no longer constitute an obstacle to recognizing in article three a prohibition of the death penalty, when this was a consequence of the transfer to a third state which could effectively apply it[161].

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remaining states before concluding that the death penalty exception in article 2 § 1 has been significantly modified. Against such a consistent background, it can be said that capital punishment in peacetime has come to be regarded as an unacceptable (…) form of punishment that is no longer permissible under article 2 (…)".

[161]ECtHR, Al-Saadoon & Mufdhi v. United Kingdom of 2 March 2010, par. 120: "(…) it can be seen, therefore, that the Grand Chamber in Öcalan did not exclude that article 2 had already been amended so as to remove the exception permitting the death penalty. Moreover, as noted above, the position has evolved since then. All but two of the Member States have now signed Protocol No. 13 and all but three of the states which have signed it have ratified it. These figures, together with consistent state practice in observing the moratorium on capital punishment, are strongly indicative that article 2 has been amended so as to prohibit the death penalty in all

Nolte in his second report for the Study Group took into consideration the jurisprudence of the ECtHR and admitted that the modifying effect in the subsequent practice highlights the treaty which is unanimous in the parts and which seems to give precedence to formal modification procedures, thus trying to limit the possibility of a modification that has an informal nature, such as for example the effect of modification which is primarily written to such procedures. In fact, in the jurisprudence just mentioned, the ECtHR both abstractly and concretely shows the possibility of an informal modification due to the verification of the unanimous practice of the states of the Council of Europe, demonstrating as cautious the evolutionary interpretative effect of the rights not provided for by the convention[162].

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circumstances. Against this background, the court does not consider that the wording of the second sentence of article 2 par. 1 continues to act as a bar to its interpreting the words "inhuman or degrading treatment or punishment" in article 3 as including the death penalty (…)".

[162]ECtHR, Johnston and others v. Ireland of 18 December 1986, par. 53: "(...) in which it is denied that social practice can determine the recognition of a right, the right to divorce, not inherent, and even deliberately excluded, from the Convention (...). However, Nolte recalls: "(...) that in Mamatkulov & Askarov v. Turkey (Grand Chamber, 4 February 2005) (…) the minority of the judges criticizes the court precisely for having recognized the power to issue binding provisional measures in an evolutionary interpretation (…)".

According to the second report of the ILC, the Special Rapporteur considered the issue of modification through the later practice which is less developed. To explain this, we immediately recall the jurisprudence coming from ITLOS, IACtHR, International Criminal Court (ICC), International criminal Tribunals ad hoc (International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR), Court of Justice of the European Union (CJEU) as jurisprudence that has not been taken into consideration due to the modifying effect which is expressly denied (Grover, 2014)[163]. Going beyond the judicial contexts, states actually recognize the informal modification but deny the modifying effect in subsequent practice involving the judicial dispute following an extra-judicial recognition for the normality of international relations (Murphy, 2013).

At this point we can say that among the conclusions, the most important for the special rapporteur is the communication to the Commission, which reports that "the treaty regulates the matter", despite the fact that this statement is scarcely verified[164] and

[163]A/CN.4/671, par. 136, in particular to note 279, Nolte referred: "(...) the reader to the second report for the Study Group: these considerations are found within the present work in correspondence to the fourth conclusion, in point II.2.2 (…)".

[164]A/CN.4/671, par. 139, as confirmed: "(...) by the fact that the informal

given the risks that many states proposed during the Vienna Conference[165] informal modification through practice prefers any effort that remains in the ambit of interpretation as a usual modus that concerns the means that are part of Article 31 VCLT[166].

Subsequent agreements and amendments. What are the modifying effects?

As regards the modifying effects relating to subsequent agreements[167] we must take into consideration the second report for the Study Group. These presented an extra-judicial nature

change is denied in the WTO and recognized within the ECHR: "ultimately" much depends on the treaty or of the treaty provisions concerned (…)".

[165]A/CN.4/671, par. 141.In particular, the Special Rapporteur referred: "(...) to the arguments of those states which highlighted the priority of the procedures laid down by the Treaty, and the problems at constitutional and stability level of the Treaty that an informal change through the subsequent practice would have entailed (…)".

[166]A/CN.4/671, par. 142: "(…) while there are indications in international jurisprudence that, absent indications in the treaty to the contrary, the agreed subsequent practice of the parties may lead to certain limited modifications of a treaty, the actual occurrence of that effect is not to be presumed. Instead, states and courts should make every effort to conceive an agreed subsequent practice of the parties as an effort to interpret the treaty in a particular way (…)".

[167]A/CN.4/671, par. 143-165.

effecting third parties. The use of these effects are present and have a limited nature in the "informal modification" which is carried out in practice and to subsequent acts[168]. The special rapporteur took into consideration: "(...) Article 39 VCLT, which speaks of modification by means of "agreements" without requiring particular formal conditions[169]. In EC-Bananas III case the Appellate Body (Rensmann, 2017) of WTO had correctly noted that Article 31.3 VCLT does not refer to the modification of the treaty but only speaks of "application" of Article 39 VCLT (Noute, 2013). This allows the modification of the treaty by means of an "agreement" (Abi -Saab, 2010). The same term is used also in article 31.3.a (Noute, 2013). These are cases that have to do with subsequent agreements and which produce the relative effects and examples where the special rapporteur serves to clarify the conditions that form part of the distinction despite

[168]"Here it is preferred to use the term "informal modification" to indicate only the modification by means of the practice, the modifications made by means of a subsequent agreement determined by a single act should qualify, strictly speaking, as "formal", though not carried out through the procedure possibly laid down by the Treaty for its amendment, Nolte himself would seem to have recognized, elsewhere, an equally formalist perspective, stating that when one is faced with a single act, as in the case of the CSPs, not one should speak of "subsequent practice" even in the case of subsequent tacit consent to such an act (…)".

[169]A/CN.4/671, par. 143-144.

the fact that the articles of specific indications are missing.
In this spirit we recall the US-Iran Tribunal case, where: "(...) recognized that subsequent agreements may have a modifying effect (...)"[170]. The jurisprudence of the panels in the NAFTA field is also very important, having to do with the qualification of the FTC Note of 2001 (Brower, 2006) in relation to the definition of the minimum standard of treatment, which in reality corresponds to Conclusion four, where one's qualification is an agreement that is merely interpretative and not without doubts[171].
In the ICJ's ruling in the Pulp Mills case[172], the ICJ recognized: "(...) that a 2004 "understanding" between the foreign ministers of the two countries could have released Uruguay from its obligations to comply with the procedures established by a treaty of 1975, but only in the event that this state had actually implemented this "understanding". The ICJ seemed to recognize

[170]A/CN.4/671, par. 148. It was Iran v. United States, Introductive Lecture ITL-83-B1-FT (Reconventional Application), 9 September 2004 (WL2210709), in which the court recognized: "(...) that the United States failed to protest against counterclaims of Iran and vice versa ("official counter-claims") demonstrated the compliance of the two states with respect to the admissibility of such applications, not expressly provided for by the CSD (…)".
[171]A/CN.4/671, par. 155.
[172]Pulp Mills on the River Uruguay (Argentine v. Uruguay, 20 April 2010).

that the modifying effect of a subsequent agreement cannot be excluded, but neither can it be presumed (...)"[173].

As regards the out-of-court practice and what is highlighted in the third report for the Study Group, it is stated that: "(...) the states intend to amend a treaty without using formal procedures, while sometimes, despite starting the formal procedure, the amendment is effectively completed through a single act. "Subsequent agreements" can lead to a treaty change, as happened under UNCLOS for the postponement of the final deadline for the election of ITLOS judges and members of the Commission on the Limits of the Continental Shelf (CLCS) (Chandraskekhara Rao, Gautier, 2018)[174]. According to Nolte, these decisions would not constitute "interpretative" agreements or the (temporary) non-execution of the treaty, but actual modifications, in consideration of the willingness of the states

[173]A/CN.4/671, par. 146-147.

[174]Article 4.3 of Annex VI to UNCLOS provided: "(...) as the last possible date for the election of the ITLOS judges on 16 May 1995, while during the first meeting of the CSP (21-22 November 1994, SPLOS/3) the term was moved to the 1 August 1996. Similarly, during the third meeting (27 November-1 December 1994, SPLOS/5) the deadline for the election of the members of the CLCS was moved to 13 March 1997, compared to the date of 16 May 1996 provided for by the Article 2.2 of Annex II to UNCLOS (…)".

parties to provide a legal basis for the new terms. In the context of UNCLOS, article four of Annex II provided for a limit of 10 years from the entry into force of the Convention for the single state that intended to extend the limit of the continental shelf beyond 200 maritime miles[175]. CSP decided that the deadline for the states for which the Convention had entered into force before 13 May 1999 would instead have elapsed from that date[176], achieving by consensus a result that would normally have required recourse to the procedure referred to in Articles 312-314 UNCLOS[177].

[175]Possibility recognized from Article 76 UNCLOS. Article 4 affirmes that: "(…) where a coastal state intends to establish, in accordance with article 76, the outer limits of its continental shelf beyond 200 nautical miles, it shall submit particulars of such limits to the Commission along with supporting scientific and technical data as soon as possible but in any case within 10 years of the entry into force of this Convention for that state. The coastal state shall at the same time give the names of any Commission members who have provided it with scientific and technical advice (…)".

[176]Decision of the eleventh meeting of the states parties (14-18 May 2001, SPLOS/73).

[177]Nolte recalls: "(...) that the Secretariat itself had advocated an informal agreement in order to implement this change (rather than a formal procedure), and that COP itself had stated that this change was part of its prerogatives, as a procedural issue and the states being "custodians" of the Convention. There was however opposition from Germany, which

We go ahead with another decision of the states parties[178] which has to do with the relative fulfillment of the procedure and which sufficiently declares the 10-year term with respect to the "preliminary information" and the related "particulars" which are required by article 41[179]. In this case, according to Nolte, we are faced with an example that shows us how states prefer to follow the path of an authentic interpretation (Berner, 2016)[180] and not of

emphasized that it would be an amendment ratione materiae (…)".

[178]Decision of the 18th meeting of states parties (13-20 June 2008, SPLOS/183): "Decision regarding the workload of the Commission on the Limits of the Continental Shelf and the ability of states, particularly developing states, to fulfil the requirements of Article 4 of Annex II to the Convention, as well as the decision contained in SPLOS/72, paragraph (a) (...)".

[179]According to article 9.5: "Ratification, approval or acceptance of amendments shall be notified to the Depositary in writing. Amendments adopted in accordance with paragraphs 3 or 4 above shall enter into force between parties having accepted them on the ninetieth day after the receipt by the Depositary of notification of their ratification, approval or acceptance by at least three-fourths of the parties to this Convention or by at least two-thirds of the parties to the Protocol concerned, except as may otherwise be provided in such Protocol. Thereafter the amendments shall enter into force for any other party on the ninetieth day after that party deposits its instrument of ratification, approval or acceptance of the amendments (…)".

[180]According to the author NAFTA parties most obviously derogated from Article 31 para. 3 lit. a VCLT by expressly vesting some authentic

a declared, precise, specific modification.

Within the framework of the Vienna Convention on substances that deplete the ozone layer which dates from 1990 and the second CSP among the states that are parties to the Montreal Protocol of 1987, numerous modifications are made. These have followed the respect of the procedure which has been noticed in Article 9.5 of the Convention. We mentioned, for example, the Decision II/2, as a procedure which with regard to the envisaged modifications should derogate from the terms of article 9.5[181].

interpretations with binding force. Similarly, an authentic interpretation may expressly claim binding force despite not following the treaty's amendment procedures. Moreover, neither treaties nor authentic interpretations are adopted accidentally. Authentic interpretation is a contradictio in adiecto that raises false expectations and creates unjustified fears. In contemporary public international law, it is readily depicted as a tool to obscure and conceal modifications and amendments of treaty law and to undermine and circumvent amendment requirements such as voting procedures, quora, or substantive principles such as non-retroactivity. Expecting that it was possible-and even necessary-to distinguish between binding and purely interpretative authentic interpretations and to limit their binding nature means to put the cart before the horse.

[181]Article 2 of Annex II of the decision I/2 affirmes that: "(…) entry into force-1. This Amendment shall enter into force on 1 January 1992, provided that at/least twenty instruments of ratification, acceptance or approval of the Amendment have been deposited by states or regional economic integration organizations that are parties to the Montreal Protocol on Substances that

This practice uses the terms which indicate the procedure which is envisaged in the decision and confirms the informal modification of the procedure.

The modification procedure takes place in a parallel manner to an informal agreement which specifically implements the modification that dates back before the completion of the relative procedure and which is independently of the fact and with the perfected effects. Of the same thought is the 1997 Kyoto Protocol which is part of the UN Framework Convention on Climate Change (Liakopoulos, 2011b). Especially, Article 18 of the Protocol provides: "(...) the establishment of the first CSP of procedures for verifying non-compliance, specifying that any binding consequence should have been established through an amendment of the Protocol (...)"[182]. Decision 27/CMP.1 already follows a Compliance Committee which in its circle includes an "enforcement branch" where its decisions have the right to appeal to the same CSP. After the appeal, according to Nolte: "(...) the state faces "binding consequences" which would have made it necessary to amend the Protocol. The amendment

Deplete the Ozone Layer. In the event that this condition has not been fulfilled by that date, the amendment shall enter into force on the ninetieth day following the date on which it has been fulfilled (…)".

[182]Article 18 of the Kyoto Protocol has been reproduced in note 1451, where the same example points out as the controlling body on the relative treaty.

procedure was actually started, but in fact the modification was made (first of all) through a decision of the parties, and was confirmed by subsequent practice (i.e. the decisions of the subsequent CSP) (...)"[183].

We continue with another example that dates back to the Basel Convention on the control of transboundary movements of hazardous wastes, their disposal and elimination that was adopted on 22 March 1989. In the second CSP of 1994 was decided by consensus the ban on the movement of waste from OECD and not countries[184], despite the relative criticisms of members who wanted the relative modification which is carried out through the amendment procedure[185]. An amendment which is part of the third CSP was taken up the following year[186].This has determined the states to take into consideration (perhaps obligatorily) the modification provided by the amendment. According to Nolte it is not a formal but necessary proof of modification that is part of the usefulness of the procedure where the states try to avoid the relative contrary position. The initiation of the modification/amendment procedure in connection with an

[183]See in particular the Decisions: 4/CMP.2 and 4/CMP.4, the procedures of Compliance Committee.

[184]UNEP/CHW.2/30, Decision II/12, p. 20.

[185]Provided for in Article 17 of the Basel Convention.

[186]UNEP/CHW.3/34.

informal agreement provides evidence asking the participating states to proceed with the modification in a formal way.

Regarding the second report to the Commission, the Special Rapporteur considered a large number of cases[187], especially from the UNCLOS (Van Dden Bossche, Zdouc, 2013)[188], the Montreal Protocol[189] and the 1989 Basel Convention. Within these cases is evident a relationship that forms part of the modification between successive agreements and the modification/amendment procedure. These are envisaged by the

[187]Substantially excluding only the example constituted by the non-compliance procedures provided for by the Kyoto Protocol for the institution by the first CSP.

[188]In UNCLOS the decision of the CSP of 1994: "(…) move the deadline for the election of the judges of the ITLOS and that of a CSP of 2001 to delay the expiration of the ten-year term for the declaration by the states of the desire to extend the limit of continental shelf over 200 nautical miles (A/CN.4/671, par. 156-158) (...)". In the same spirit see also: Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area (Request for Advisory Opinion submitted to the Seabed Disputes Chamber), ITLOS Case No. 16 (1.2.2011), para. 57; Golder v. United Kingdom, 21.2.1975, Ser. A No. 18, para. 29.

[189]The Protocol of 1990 modifies the same amendment procedure provided for by the Vienna Convention of 1985 for the protection of the ozone layer, of which the 1987 Protocol is part A/CN.4/671, par. 159-161.

treaty itself without underlining the informal agreement which "anticipates" the formal procedure thus carrying out the modification even if it is not concluded[190].

The special rapporteur highlighted the distinction between successive agreements through the different forms assumed and the subsequent agreement that the treaty has as its object or not. The subsequent agreement, according to ex article 31.3.a) and the relative agreement amendment that dates back to the former article 39, has binding force. The reference to the Basel Convention demonstrates that states prefer to follow the execution of the amendment procedure and to avoid discussions that do not necessarily take into consideration the previous agreement which is illegitimate[191].

A conclusion in this case is the trend of attribution of the agreement with a broad interpretative scope that explicitly recognizes the modifying effect. A subsequent agreement which is derogated through the formal amendment procedure does not

[190]A/CN.4/671, par. 162. The example is that CSP decides in 1995: "(...) to consensus to prohibit the transport of hazardous waste from OECD states to non-OECD countries, followed in 1996 by the decision of the subsequent CSP to start the amendment procedure for the same purpose, generating a contrast between states that consider the prohibition already valid and others that deny this possibility (…)".

[191]A/CN.4/671, par. 163.

change the treaty but affects its object and purposes on essential elements. We recall for example the modifying effect in the subsequent practice which depends as much on the circumstances in the concrete case and on the abstract determination that has to do with the slight boundary between modification and interpretation[192].

Towards reformulation

From what we have followed and understood so far we can understand that the ILC appears to be not so compliant and positive in the choice to refer to a modifying effect that dates back as extraneous in the context of the study that focuses on the interpretation of the treaties[193]. Perhaps it suggests the path of the special rapporteur who used the protection of a necessary positive crisis that has to do with the requested issue (Venzke, 2012)[194]. This is a precise location. On the one hand, the precise

[192]A/CN.4/671, par. 164-165.

[193]Forteau (A/CN.4/SR.3205, p. 7): "(…) it was doubtful whether it was appropriate to address issues related to the implementation of a treaty or its amendment when the topic under consideration related to the interpretation of treaties (…)".

[194]Kamto (A/CN.4/SR.3207, p. 6): "(…) in principle, he was opposed to the possibility of modifying the treaty by means of subsequent practice, but if the Commission were to tackle that issue in the context of the topic under

affirmation of the modifying effect that it assumes in a "generally recognized" way is doubted[195], and on the other hand, the subsequent practice that allows the limit as an interpretative effect, also in an evolutionary sense, is highlighted[196]. Thus it is affirmed that the question is decisive for the substance of the conduct than in its form[197].

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discussion, it should be extremely cautious and strictly limit that possibility, because it stretched the formal review procedure provided for in all treaties (…)". Niehaus (A/CN.4/SR.3208, p. 4) and Wood (A/CN.4/SR.3208, p. 8, remembering, moreover: "(…) that the Vienna Convention adopts the term "amendment", distinguishing it from "modification" (…)".

[195]A/CN.4/SR.3205, p. 7, cited the opinions of Namibia and wall of Palestinian territories of ICJ, in which "(…) appeared to have recognized that subsequent practice could indeed result in amending a treaty (…)".

[196]Gomez Robledo (A/CN.4/SR.3208, p. 4): "(…) the line (between interpretation and amendment) was by no means so tenuous, since the subsequent practice of the parties was merely one of the elements in the general rule of interpretation set out in article 31 of the Vienna Convention. Moreover, the report showed that it was only in decisions of arbitral tribunals that a treaty was seen to be susceptible to modification by the practice of parties. The majority of the international courts considered subsequent practice as providing an evolutive interpretation of a treaty (…)".

[197]Park (A/CN.4/SR.3206, p. 4): "(…) in paragraph 2, a distinction was made between modification of a treaty and conduct by which the parties "intended to interpret" a treaty, the distinction being whether or not the

The Drafting Committee tried to eliminate the eleventh conclusion which was also addressed in the seventh and was dedicated to the "effects of the agreements", the subsequent practice, the contents of the first paragraph, the second paragraph which concerned the modifying effect of the following practice and, the seventh conclusion[198]. The formulation is certainly

conduct was consistent with the treaty provisions governing modification. It was the substance, not the form of conduct, which was important. Subsequent practice resulting in a fundamental change in a treaty was a de facto modification and not an interpretation of that treaty (…)".

[198]It is also recalled that the original paragraph 7.2, concerning: "(…) the "specificity" of the practice, originally placed in the conclusion dedicated to the possible effects of the subsequent practice, was moved to the eighth conclusion, dedicated to the value of Escobar Hernandez (A/CN.4/SR.3207, p. 4), after stressing that the first paragraph of the conclusion should be moved to conclusion 7 and the second paragraph in the 6th, Escobar Hernandez states that: "(…) the reference to modifying a treaty should also be deleted (…)". Tladi (A/CN.4/SR.3207, p. 5), Sturma (A/CN.4/SR.3207, p. 6) after having stated that: "(...) instead of confining itself to article 31 (…) with regard to the controversial issue of the subsequent agreements the object of which It was not possible to interpret the scope of the topic, but it was the interpretation of treaties (...)", Hmoud (A/CN.4/SR.3208, p. 5): "(…) (the Commission) must remain within the confines of the topic and have been changed. subsequent practice, it would be counterproductive to address the topic from the standpoint of its relationship to the rules on interpretation (…)". Vasquez Bermudez (A/CN.4/SR.3208, p. 9) and

similar to the eleventh conclusion and as proposed by the special rapporteur there is a presumption that the intention of the parties adopting an agreement or a subsequent practice is to interpret the treaty and not to modify it, but choosing the rather broad expression of "agreement subsequently arrived at" in order to include the "agreements" that Article 39 VCLT (Noute, 2013) indicates as possible tools for modifying the treaty (Sorel, Borè Eveno, 2011), an indication that there is no general recognition of the possible modifying effect of the subsequent practice[199]. A last

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Gevorgian (A/CN.4/SR.3208, p.10), recalling that: "The Vienna Convention was based on the original intentions of the authors of the treaties elucidate those intentions The International Court of Justice had repeatedly emphasized that the interpreter's task was not to review treaties or to bring up things they did not contain (...) and a modifying effect of subsequent agreements or practices. it would end not from Article 31.3 VCLT but from article 39, and if the treaty needs to be interpreted in an evolutionary way it is because the time has come to amend it, through the appropriate formal procedures (…)".

[199]Statement of the Chairman of the Drafting Committee, Mr. Gilberto Vergne Saboia, 5 June 2014, p. 6: "(...) the use of the phrase "agreement subsequently arrived at or a practice in the application of a treaty" seeks to clarify this distinction [ex Article 39 and ex Article 31.3 VCLT] and points to a wider notion of those terms. The commentary will provide further clarification on this point (…)".

sentence was added[200], including a safeguard clause according to which the rules on amendment and modification contained in the Vienna Convention apply in any case, in addition to the customary ones[201].

We noted that the states dedicated the last paragraph of this conclusion in their speeches to the Sixth Commission of the General Assembly. According to a cautious formulation that is adopted by the special rapporteur, it is assumed that the parties intend to interpret the treaty in this way according to a modification which suggests that the modifying effect is excluded in a manner and in nature[202]. And as it is highlighted,

[200]Draft Conclusion 7.3-"It is presumed that the parties to a treaty, by an agreement subsequently arrived at or a practice in the application of the treaty, intend to interpret the treaty, not to amend or to modify it. The possibility of amending or modifying a treaty by subsequent practice of the parties has not been generally recognized. The present Draft Conclusion is without prejudice to the rules on the amendment or modification of treaties under the Vienna Convention on the Law of Treaties and under customary international law (…)".

[201]"The clause is introduced because it explains the fears of some members that it could be conceived customary law leaves room to the hypothesis that the modifying effect of the following practice can find in the future recognition (if it does not already find it) in a custom (…)".

[202]Austria (A/C.6/69/SR.22. par. 18), specifying that: "(...) the affirmation is true only in so far as we consider the "practice" defined by the conclusion

the agreement with its own formulation questions a limited denial that has to do with the informal modification[203]. The question asks for the distinction between the effects of successive agreements which abstain from taking a precise position[204]. We must also take into consideration the fact that the effects of the subsequent practice cannot be contrary to the intention of the

4.2 as "authentic means of interpretation", but in a more general perspective, practice can certainly modify a treaty: Notwithstanding the decision taken at the 1969 United Nations Conference on the Law of Treaties to delete former draft article 38 (Modification of treaties by subsequent practice) of the Vienna Convention, it seemed clear that subsequent practice establishing an agreement to modify a treaty should be regarded asa modification of the treaty and not merely as an interpretation exercise (…) where no such intention of the parties could be established, general international law did not exclude the possibility that states parties to a treaty could establish customary international law through their subsequent practice, if accompanied by opinio juris, and could thereby modify the rights and obligations contained in the treaty (…)". Romania (A/C.6/69/SR.22): "(…) it would be sufficient to refer to the presumption that State practice in the application of the treaty would imply its interpretation and not its amendment or modification. In addition, that sentence might be considered overly restrictive, in view of the thin line between interpretation and modification (…)". Germany (A/C.6/69/SR.23, par. 37): "(…) without excluding the possibility that subsequent practice might, in very specific cases, amend or modify a treaty, the Draft Conclusion also accurately pointed out that that possibility had not been generally recognized (…)".

parties[205], despite the fact that some states explicitly wished to follow the impossibility of an informal modifications[206]. We must also consider the position[207] which clarifies the relationship between formation, modification and, interpretation of customary norms which in reality follow different paths and distinct formation processes (Buga, 2018).

[203]Belarus (A/C.6/69/SR.21, par. 122). In fact: "(...) with reference to the 11th conclusion proposed by the Special Rapporteur, the Belarussian representative states: "Interpretation in good faith in any form should not replace the existing procedure for amending a treaty", Russia (A/C.6/69/SR.21, para 131), recalling the problems of stability of the treaty and of national law that would be created recognizing the possibility of an informal change, and that: "(…) If, in the process of application to treaty, there arose to broad need for evolutionary interpretation through subsequent agreements and practice, that is to say directly enshrining changes that had taken place in the parties "understanding of their obligations since they had signed the treaty (…)". France (A/C.6/69/SR.22, paragraph 32), "(…) also suggesting not to use the word "to agreement": "the use of the term "agreement" in the title of the topic could be confusing insofar as a result of an agreement (…)". Poland (A/C.6/69/SR.22, par. 58), in particular: "(…) recalling that a treaty may expressly prevent the subsequent practice of modifying it, as recognized by the European Court of Justice in the case of Gabrielle Defrenne v. Société anonyme belge de navigation aérienne Sabena, in which a resolution of the Member States of 1961 concerning gender discrimination in wages could not have the effect of extending the time limit set by the Treaty (…)". Japan (A/C.6/69/SR.23, para 72): "(…)

Subsequent practice and means of interpretation

The boundaries between modification and interpretation as indicated in the ILC and as described in the possibility of interpreting a treaty progressively are taken into consideration in the Draft Conclusion 2-Subsequent agreements and subsequent

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any change to the provisions of the Treaty of the United States (...), Malaysia (A/C.6/69/SR.24, para. 29): "Modification or amendment of a treaty 39 to 41 of the Vienna Convention on the Law of Treaties (…)". Greece (A/C.6/69/SR.24, para. 87): "(...) that presumption [that the parties, by a subsequent agreement or practice in the application of a treaty, which is supported in the commentary by a also proposing to move the safeguard clause in conclusion 3 ("Interpretation of Treaty Terms as Being of Evolving Over Time") (…)". Vietnam (A/C).6/69/SR.25, par. 15), recalling: "(...) the elimination of Article 38 from the Draft Convention on the Law of Treaties of 1966, the absence of support in the jurisprudence and state practice, and the conflict with the Vietnamese internal rules, which stipulated that amendments to treaties must be agreed upon by the parties concerned (…) (…)".

[204]Italy (A/C.6/69/SR.22, par. 47): "(…) the Commission's decision to focus on interpretation made it inappropriate for the time being to take a definite stand on the issue of treaty modification. The ambiguity between interpretation and modification was, in fact, recognized in the commentary (…)". The Netherlands (A/C.6/69/SR.23, par. 47): "(…) a clear distinction should be made between the process of amending or modifying treaties through the operation of Articles 39 to 41 of the Vienna Convention on the

practice as authentic means of interpretation. Subsequent agreements and subsequent practice between the parties to a treaty are authentic means of interpretation which shall be taken into account in the interpretation of treaties. Subsequent agreements and subsequent practice by the parties may guide the

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Law of Treaties and the process of interpreting treaties (…)". El Salvador (A/C.6/69/SR.23, par. 90). Spain (A/C.6/69/SR.24, par. 20). Ireland (A/C.6/69/SR.24, par. 43), recalling: "(...) that the European Court of Human Rights recognizes the possibility of modifying the ECHR in the subsequent practice and the United States (A/C.6/69/SR.24, par. 60) (…)".

[205]Russia (A/C.6/69/SR.21, par. 130): "(…) the 1969 Vienna Convention on the Law of Treaties was based on the principle that the genuine intentions of the parties to an international treaty were expressed first and foremost in the treaty itself and that identifying them was the main task of the interpreter. International judicial bodies, including the International Court of Justice, had stated on many occasions that the interpreter's task was not to review treaties or to identify in them anything that was not there, either overtly or indirectly (…)".

[206]Republic of Chile (A/C.6/69/SR.24, par. 47), "(…) Recalling the rejection of the article 38 proposed by the Commission in 1966, the prejudice to the pacta sunt servanda principle and at the constitutional level that would otherwise be produced, and the absence of decisions by the ICJ to support it (…)". South Korea (A/C.6 /69/SR.25, paragraph 25): "(…) suggesting that the Commission pay attention to the future case law, although it was true that at present the possibility of modification through subsequent practice

evolutionary interpretation of a treaty[208]. It is a fairly extensive position regarding interpretation[209]. This is an analysis that was followed in the second part of the first report of the Commission which is dedicated to the agreements and to subsequent practice using "authentic means of interpretation"[210]. Also in this case the special reporter Nolte based himself ex novo on the jurisprudence coming from the ILC, the Kasikili\Sedudu case[211] and the case law which was collected and elaborated in the second report for the Study Group, trying to demonstrate the use of related tools to investigation. Here, the question that arises is how jurisprudence

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was not "generally recognized" (…)".

[207]Spain (A/C.6/69/SR.24, par. 22): "(…) feneral international law did not preclude the parties to a treaty from creating customary law through subsequent practice if the relevant opinio juris existed; in fact, the absence of a hierarchy of norms in international law would support such a possibility. However, a systematic effort should be made to keep the two processes separate, as their legal consequences were different (…)".

[208]A/CN.4/660, par. 64.

[209]The Special Rapporteur links this Conclusion to Preliminary Conclusions 4 and 7 identified in the 2011 Commission Report (A/66/10, para 344), entitled, respectively, "Recognition in principle of subsequent agreements and subsequent practice as means of interpretation" and "Evolutionary interpretation and subsequent practice".

[210]A/CN.4/660, par. 29-30.

[211]A/CN.4/660, par. 32.

intends to interpret successive attitudes as an "authentic means of interpretation"[212], thus summarizing an analysis of particular case laws.

Authentic means of interpretation. Subsequent conduct and related jurisprudence

As an "authentic means of interpretation" international jurisprudence is considered, such as for example the ICJ and the WTO especially in the case for the use of DSB instruments which present the subsequent conduct in a restrictive way, taking into consideration Article 31,3.b) of the Vienna Convention (Van Damme, 2010).

It is an interpretative body of an evolutionary nature based on terms of both the object and the purposes of later practice. Also in this point Nolte underlined that: "(...) the subsequent conduct of the parties, precisely insofar as it is based on the obligatory agreement of the parties (and therefore on consent), could perform this evolutionary function in the future, making it possible to move away from the rigidly textual approach adopted so far, in particular by the Appellate Body (…)" (Nolte, 2013).

[212]It is emphasized that the Commission uses this expression in describing all the interpretive means of the then Article 27 of the 1966 Project on the Law of Treaties.

In the same spirit from the jurisprudence of the USA-Iran Tribunal, respecting the rules of the Vienna Convention, the legitimate proceedings of para-state or private entities derive from the bilateral nature of their jurisdiction, which take into consideration their own positions and attitudes (Nolte, 2013). In the ICSID Tribunals a limited use is noted, we dare to say precisely, that also considers the subsequent practice and recognizes the interpretative effects of the subsequent state practice which involves the relative risk of modification even retroactively of the rights of the private investors. Nolte states that: “(...) private interests do not normally constitute an obstacle for the use of the subsequent practice by, above all, the ECHR”. In this sense, one could not exclude an increase in the use of this criterion by the Courts (Nolte, 2013).

As far as the NAFTA courts are concerned, their role for interpretation is recognized in subsequent practice, thus restrictively attributing the reduction of the possibilities that this criterion plays when the requirement to determine the results is satisfied. As regards the agreement between the parties, the courts grant ample space as we have noted in the US-Iran Tribunal case. This respects the bodies of the WTO in a greater exten as noted in Article 102.2 NAFTA Relating to Target Liberalization. Thus the interpretation of the notes coming from

the FTC attracts more attention to international organizations in which a body has the express power for an authentic interpretation (Nolte, 2013).

(Follows): Protection of human rights and related jurisprudence

Practice has shown that the continuing jurisprudence in the field of the human rights and especially from the ECtHR offers numerous forms of practice[213] which is not always framed in the interpretative sector of Article 31.3.b) VCLT (Noute, 2013). In practice the ECtHR has followed and adopted for years in the field of interpretation a very broad and extensive path that has considered the practice not only of the states but has also tried to find a balance with the objectives of the ECHR itself. The continuous practice in the sector has shown a consensus of a partial nature which has reduced the value of the practice and as a consequence the substance of the agreement has often remained reduced. The lack of attention and the relative silence in the sector shows a certain lack of interest where the agreement invests a point of law that is always connected with the convention, i.e. with the relative relational requirement.

[213] A/CN.4/660, par. 36-39.

The ECtHR has followed the path of attributing the relative practice to the states that respect in an applicative way what the ICJ has also pre-established in relation to social practice, i.e. as regards the position of the state and of the ECHR. Nolte pointed out that the ECHR does not pose a problem of application by lower-ranking or private bodies, but it is inevitably applied, especially, by governments and parliaments (Nolte, 2013). This is why the ECtHR seems to overlook the requirement of sufficient certainty in practice, since it is sufficient to verify that the powers of the state are exercised in accordance with the Convention or not, without the need to verify that it needs a specific conduct, perhaps by a lower-ranking body, undertaken with the aim of implementing an interpretative agreement on the treaty (Nolte, 2013)[214].

This would be particularly useful when the Court intends to find

[214]It must be borne in mind that a human rights treaty is not designed to be authoritatively interpreted and applied by executive organs of the state, but rather must be appropriately taken into account in the legislation and international agreements of states. For that purpose, sufficiently strong trends in the nation. This does not mean, however, that this specific practice is carried beyond the limits of what could be deduced from it. For example, in Al-Adsani (note 554) the judges were divided about the possibility of deriving from the prohibition of torture, now recognized as a binding rule, an exception to immunity also in civil, as well as criminal.

support, in general, for the existence of an obligation of guardianship, with the aim of extending the scope of a right guaranteed by the ECHR. It is present in a few cases that are related to the death penalty, an issue of such importance that it could constitute an exception in the context of the ECHR. The informal modification, in concrete terms, has always been accompanied by the willingness to be modified through the ordinary procedure of the Additional Protocols. The human rights treaty was an example of this and has been concluded between relatively homogeneous states. This is a factor to keep in mind when looking at the interpretative approach followed by the ECtHR and comparing it to that of other international courts (Nolte, 2013).

In the jurisprudence of the Inter-American Court of human Rights (IACHR) (Quispe-Remòn, 2010; Von Bodandy, Venzke, 2012; Neumann, 2012; Ferrer Mac-Gregor, 2015; Gonzàlez-Salzberg, 2015; Haeck, Ruiz Chiriboga, herera, 2016; De Pauw, 2016; Orentlicher, 2018; Hennebel, 2022) we note a poor practice that is explicitly distinguished according to letters b) and c) of Article 31.3. VCLT (Dörr, 2018). This is a reduced state practice since it examins serious human rights violations that are antithetical to its consideration and respecting the will of the inter-American Court as an extension of protection of human

rights. This inhomogeneity of the political systems of the states in Latin America has already been based on the period of the cold war (Nolte, 2013). In comparison with the jurisprudence of the ECtHR, the use of the subsequent practice is certainly greater not so much in quality but in quantity according to the non-serious nature of the violations and the non-homogeneity of the political systems.

Speaking for human rights we also mean the Human Rights Committee where it makes use of the interpretative criteria of the VCLT regarding the purposes and the object of an agreement. The lack of the subsequent agreements and the subsequent practice are used by the agreement between the parties. Nolte stated that it is "(...) a summary approach which reflects the brevity of the Committee's reasoning, and which also diverges on the basis of the subject matter (...)" (Nolte, 2013). As we can also understand from Nolte's opinions, it is a logic that gives priority to purposes and to the object as interpretative criteria that open up more space to the subsequent practice, giving support to an interpretative path that is achieved through the object and purposes of the same Pact. Thus the practice performs a function of an auxiliary nature which excludes, rectius supports the legitimacy of certain restrictions of the rights which are included in the Pact, as well as specifying the burden of proof for the state

which justifies this type of restriction.

(Follows): Relative jurisprudence in other interpretative contexts

As regards, for example, the International Tribunal for the Law of the Sea, the second report for the Study Group stated that it was not possible to collect precise and concrete conclusions due to the scarce jurisprudence[215]. It is obvious that the role it plays in subsequent practice is underlined and verified according to the spirit of ex Article 31.3.b) VCLT (Dörr, 2018). It is excluded that the role of practice forms customs in this case with regard to the matter of the sea (Lèvy, 2007) and given the breadth of terms that are used by the UNCLOS and the related tools, the practice is not framed in a continuous development and/or articulated in the jurisprudence of the tribunal. The practice is framed within a subsequent development of the jurisprudence which refers to precise questions of analysis (Nolte, 2013)[216]. We find that the

[215]A/CN.4/660, par. 40-41.

[216]In which the practice, presumably, will play a more important role, Nolte mentions the "determination of straight border lines, the passage of ships laden with dangerous substances in territorial waters, the military maneuvers in the exclusive economic zones, the transit in international straits (…)".

court is required to review the participation of states and subsequent practice as a type of qualification and as a subsequent agreement for an amendment after the implementation agreement of 1994. So let us consider the third report for the Group of Study stating that this agreement is considered as a subsequent one[217].

Turning to the jurisprudence of the international criminal courts[218] we note a relative demonstration of an openness of the subsequent practice despite the fact that the sector of analysis is very different from the other courts and that it features a certain stability. An opening that shows that the special courts necessarily refer to an area that includes the customary notion where the practice constitutes a certainly constitutive element as we have seen from the practice of the International Criminal Court (ICC)[219]. The practice that is considered was understood in

[217]In particular in the sense of considering or not the acquiescence of states without access to the sea, and the need to react to unilateral or regional practices.

[218]Although in his second report for the Commission the special rapporteur did not refer to the (scarce) jurisprudence of the International Criminal Court.

[219]Here Nolte seems: "(...) to draw a parallel between interpretative practice and practice constitutive of customs, although, as seen, in the jurisprudence of special courts to detect is the practice following certain treaties that help to identify the habits (and not, in itself, the practice constitutive of customs) (…)".

a broad way and without verifying the related requirements as seen in Article 31.3.b) VCLT, concerning the agreements between the parties. An important element refers to the jurisprudence of human rights courts which dynamically represents the case laws that are analyzed (Nolte, 2013).

Moving on to yet another super partes court, i.e. the Court of Justice of the European Union (CJEU) where it characterizes the European legal system and which determines, we can say a certain non-precise but broad and often scarce relevance in the practice of the states with regard to the interpretation of primary law. The agreements with third states are interpreted in parallel with the subsequent practice and, as conceived, in a rigid manner. Such a rigorous attitude shows that the will of the CJEU is exclusive and competent only to interpret the right of the Union which assumes a role of defender in this type of right. Nolte recalled that: "(...) the ECtHR, although endowed with an exclusive competence (for the interpretation of provisions for the protection of fundamental rights), grants much more space to the subsequent state practice, conceiving it more broadly (…)" (Nolte, 2013).

Already in the first report for the Study Group, an interpretative approach of the Permanent Court of the International Justice (PCIJ) was affirmed, highlighting the intention of the parties to

follow the subsequent attitudes at a second level, as a dynamic criterion for interpreting the treaties (Chang-Tung, Garcia, 2019). A court that has followed the auxiliary, supplementary interpretative means to confirm a precise result of interpretation that has reached the institutional regime of the treaty and motivated its role only statically[220]. In this spirit we recall the case of the Opinion on the Jurisdiction of the Courts of Danzig (1928): "(...) the intention of the parties, which is to be ascertained from the contents of the agreements, taking into consideration the manner in which the agreement has been applied, is decisive (…)" (Nolte, 2013).

(Follows): "Authentic means of interpretation" and subsequent conduct

Dealing with the "authentic means of interpretation" and the

[220]Particularly in two opinions involving the International Labor Organization, especially in the case of the Free City of Gdansk and the ILO (1930): "(…) interpreting in a restrictive sense Poland's powers over Gdansk's foreign relations starting from the practice of the High Commissioner and later agreements between the parties (…)". But also in the case of the ILO's jurisdiction to regulate, incidentally, the personal work of the employer (1926), refers: "(...) to the use of the practice by the national courts in order to resolve questions of constitutional legitimacy about the powers of the government (…)".

subsequent conduct, the ILC followed a more concise path, as we have already seen in the first report, since it is focused on the jurisprudence of the ICJ and in particular on the relationship between the subsequent conduct and the related means of interpretation according to Article 31 VCLT (Dörr, 2018), where the Study Group indicates the seventh conclusion that was dedicated to the subsequent conduct. The relative relationship between subsequent conduct and subject matter according to the objectives of the treaty is not generally concluded as seen from the jurisprudence of the ICJ. The role played by the agreements and subsequent practice determines the character of the treaty and the nature of its content constituting expressions having to do with the objectives and subject-matter of the treaty. Thus the role of subsequent conduct to this report is investigated through a modern, dynamic, evolutionary interpretation that takes up an introductory report as a starting point.

(Follows): Study Group, first report and evolutionary interpretation

The study group in its first work dealt with the evolutionary interpretation. Particularly, it was referred to the Costa Rica v. Nicaragua case of the ICJ in 2009. The interpretation argument was based on the expression “objetos de comercio”. An

expression that has been widely interpreted given that Nicaragua meant only the trade of goods, on the basis of an interpretation based on the prevailing meaning of “trade” at the time of the conclusion of the treaty, while Costa Rica defended the exercise of transport of tourists on the river, on the basis of an evolutionary interpretation of the term. The ICJ rejected Nicaragua's argument, stating that the use of a generic term is certainly an indication that the parties intended to recognize the possibility that the treaty could evolve over time, as the ordinary meaning of the term itself varied. Judge Skotnikov reached the same result using the interpretative criterion of the subsequent practice, i.e. the exercise of tourist services by Costa Rica on San Juan River for more than ten years, without protests from Nicaragua. Additionally, Nolte confirmed that subsequent conduct can support an evolutionary interpretation (Noute, 2013). This is not an intertemporal issue according to the ILC that ties in with the VCLT nor did it come to be part of the 2006 report on the fragmentation of international law as a definitive solution that is assimilated with the relationship between subsequent conduct and evolutionary interpretation. Already in that report the special rapporteur Martti Koskenniemi followed a precise and very cautious approach as an interpretation that follows the formation of contemporary international law thus verifying the terms that

are used in the concrete case as support of an evolutionary nature[221].

This is an approach that is supported by the jurisprudence and which excludes that the latter concerns various topics. These are treaties that have to do with the delimitation of borders, the interpretation of a contemporary nature, the need to follow the

[221] A/CN.4/L.682, par. 478: "(…) because it seems pointless to try to set any general and abstract preference between the past and the present, it is best, once again, to merely single out some considerations that may be relevant when deciding whether to apply article 31 (3) (c) so as to "take account" of those "other obligations" as they existed when the treaty was concluded or as they exist when it is being applied. The starting-point must be, again, the fact that deciding this issue is a matter of interpreting the treaty itself. Does the language used give any indication? The starting-point of the argument might plausibly be the "principle of contemporaneity"-with regard to the normative environment as it existed at the moment when the obligation entered into force for a relevant party. When might the treaty language itself, in its context, provide for the taking account of future developments? Examples of when this might be a reasonable assumption include at least: (a) Use of a term in the treaty which is "not static but evolutionary" (...) (b) The description of obligations in very general terms, thus operating a kind of renvoi to the state of the law at the time of its application (...)".

content of the treaty and one's own stability[222] without excluding[223] that it may recognize an informal modification of the same treaty according to a national evolutionary type of interpretation practice that is affirmed when there are terms that depend on the same context[224].

Nolte does not seem to contradict the support coming from the doctrine regarding the possibility of interpreting a treaty in an evolutionary way, but at the same time it seems to do so while maintaining a certain respect for the will of the parties, as in the Gabcikovo-Nagymaros case of 25 September 1997 (Liakopoulos,

[222]For example, Nolte brings: "(...) the cases of the Temple of Preah Vihear (1962), Kasikili\Sedudu (1962), Eritrea v. Ethiopia (2002), Cameroon v. Nigeria (2002), all decided by the ICJ, and in which it was a matter of interpreting very specific terms ("watershed", "main channel/Thalweg", place names and "mouth of a river" respectively (…)".

[223]Regarding the modifying effect of the subsequent practice as treated by Nolte in the first report for the Study Group, and then in the second report for the Commission.

[224]For example, in the opinion on Namibia (1971), where the expressions: "(...) the well-being and development of such peoples' and "the strenuous conditions of the modern world" in article 22 of the Covenant of the League of Nations are interpreted by the ICJ in the light of the modern principle of self-determination, while in Greece v. Turkey (1978) the evolutionary interpretation is based on the generic nature of the terms used, and Costa Rica v. Nicaragua (2009) on the "lasting" nature of the treaty (…)".

2012). The choice between one type of interpretation and the other would ultimately depend on the terms used and the circumstances, and it is not possible to exclude the simultaneous use of both interpretative methods. The relationship with the subsequent conduct, therefore, after specifying that the evolutionary interpretation does not constitute a criterion of interpretation, should correctly applying these criteria. The subsequent conduct can both justify, by itself, an interpretation of an evolutionary type, and limit it, in the sense of subordinating it to the will of the share an extension of meaning that could otherwise be even greater (Nolte, 2013)[225].

Already in the second report the analysis was based on the Costa Rica v. Nicaragua case where Nolte himself examined the relative jurisprudence of this report above all on the basis of WTO's DSB which interprets the ECtHR in an evolutionary way that is part of the living instrument. A confirmation that is valid as a simple contemporary interpretation since the cases use an

[225]For example, the arbitration court in the case concerning the delimitation of the maritime border between Guinea Bissau and Senegal (1989) (Maritime Delimitation between Guinea-Bissau and Senegal (Guinea-Bissau v. Senegal), 1991-1995): "(...) adopts a "contemporary interpretation", but at the same time affirms the possibility of interpreting certain terms evolutionarily (…)".

interpretation of an evolutionary nature[226].

Towards a reformulation

The ILC has dealt, as we understood from the previous paragraphs, with the evolutionary interpretation of contemporary international law[227]. It considers interpretation as an investigation of the will of the original nature of the parties based on a text that reveals the interpretation of an evolutionary type[228]. Nolte thus stated that: "(...) interpreting a treaty means going in search of the intention of the parties, but agreements and subsequent practice serve precisely to clarify this intention"[229]. This had

[226]A/CN.4/660, par. 54-63.

[227]Tladi (A/CN.4/SR.3159, p. 7): "Subsequent agreements and subsequent practice could just as easily support an evolutive interpretation as they could a contemporaneous interpretation, owing to the fact that they were merely tools for identifying, in good faith, the ordinary meaning of the terms of the treaty in their context and in the light of its object and purpose (...)". Wood (A/CN.4/SR.3160, p. 3), Escobar Hernandez (A/CN.4/SR.3162, p. 7) and Jacobbson (A/CN.4/SR.3162, p. 8).

[228]Al-Marri (A/CN.4/SR.3160, p. 4), Huang (A/CN.4/SR.3160, p. 4) and Hmoud (A/CN.4/SR.3160, p. 4): "(...) whereas it is generally questioned whether an interpretation which does not reflect the original intention of the parties to the Treaty is admissible (…)".

[229]A/CN.4/SR.3160, p. 4.

highlighted the lack of reference to Article 31.4 VCLT, i.e. a special meaning desired by the parties[230].This omission would have been due precisely to the excessive emphasis that has been placed on the original intention of the parties[231]. Moreover, this omission is evident in the second Conclusion and particularly to Article 31 and, to second [232] and third paragraphs that are dedicated to the context[233].

Many members of the ILC were contrary of the evolutionary interpretation[234], despite the fact that for some the reference to the

[230]Forteau (A/CN.4/SR.3160, p. 4): "(…) as an intention modifying the original intention of the parties (…)".

[231]A/CN.4/SR.3160, p. 4: "(…) paragraph 4 (...) suggested that "the parties so intended" meant the original intentions, which was restrictive (…)".

[232]Escobar Hernandez (A/CN.4/SR.3162, p. 7).

[233]Jacobbson (A/CN.4/SR.3162, p. 8).

[234]Petric (A/CN.4/SR.3161, p. 5): "(…) stressing in particular that the ECtHR's evolutionary approach, as typical of this court, could not be extended in a general way (…)". Murhpy: "(…) stresses that all means of interpretation are "authentic" as indicated by the Vienna Convention criticizes the reference to the evolutionary interpretation precisely because it lacks support in the Convention itself-A/CN.4/SR.3161, p. 6 (…)". Murase (A/CN.4/SR.3162, p. 5) and Gevorgian (A/CN.4/SR.3163, p. 3): "(…) since in the absence of any definition of that notion (of evolutionary interpretation), its meaning could be deduced only by applying a variety of means of interpretation (…)".

clarification did not constitute an evolution, but an "interpretative method", an application of the means that come from the VCLT itself[235], as indicators of the parameters of their own application[236], which envisaged to give a more concrete definition[237]. According to our opinion, the lack of an indication of effects of various types in conduct subsequent to bilateral and multilateral treaties[238] has to do with the choice of adopting a language that is close to the VCLT as a reference to the contemporary, evolutionary interpretation of the result application of the means indicated by the same VCLT[239].

The Drafting Committee and the various positions of ILC that chose to draft the two conclusions are different. The first conclusion is based on evolutionary interpretation[240]. The second

[235]Sturma (A/CN.4/SR.3162, p. 3). Kamto (A/CN.4/SR.3162, p. 3).

[236]Wisnumurti (A/CN.4/SR.3162, p. 5).

[237]Hassouna (A/CN.4/SR.3163, p. 3).

[238]Kamto (A/CN.4/SR.3162, p. 3). In particular: "(…) while for the former (multilateral Treaties) they could be a means of interpretation, for the latter [bilateral treaties] their effect was to modify or confirm the original intention of the parties (…)". Escobar Hernandez (A/CN.4/SR.3162, p. 8).

[239]A/CN.4/SR.3163, p. 6.

[240]Statement of the Chairman of the Drafting Committee, Mr. Dire Tladi, 31 May 2013, p. 6: "(…) the Drafting Committee considered that the content of paragraph 2 of the text initially presented by the Special Rapporteur, which addressed the question of evolutive interpretation, would be better dealt with

one, clarified the agreements of subsequent practice as "authentic means" of interpretation which actually takes up the expressive content in the commentary of the ILC in Article 27 VCLT. In it, the subsequent conduct affirms the objective evidence of the understanding of the parties as to the meaning of the treaty. Again the reference to Article 31 VCLT (Dörr, 2018) is used to remark that in any case the use of these interpretative means must take place in application of the general rule of interpretation[241].

Continuing with the Sixth Commission of the General Assembly, divergences can be noted regarding the terminological choices that are made by the same commission during the elaboration of the second conclusion. The expression "objective evidence" is thus not calculable on the one hand[242], but subordinated and

in a separate draft conclusion (…)".

[241]Statement of the Chairman of the Drafting Committee, Mr. Dire Tladi, 31 May 2013, p. 7.

[242]France (A/C.6/68/SR.17, par. 119: "(…) the term was neither necessary nor helpful. States' interpretation of a treaty might evolve and vary according to need and circumstance. It would be preferable not to describe the evidence as "objective", although that did not detract from the relevance of giving consideration to subsequent agreements and subsequent practice in order to interpret a treaty. On the other hand, it would be useful if future work were to draw a distinction among subsequent agreements between those that were binding and those that the parties did not acknowledge as such (…)".

elaborated to be positive in the opinions of many states[243], while the expression "authentic means"[244], on the other hand, indicated the general critical observations[245]. The new Conclusion no. 3 actually takes up the second paragraph of Conclusion no. 2 which was elaborated and proposed by the same special rapporteur. The ILC calculated ex novo in this way the evolutionary

[243]South Africa (A/C.6/68/SR.18, par. 42), Slovakia (A/C.6/68/SR.18, para.75): "(...) though affirms the need to define this expression more clearly (…)". Ireland (A/C.6/68/SR.18, par. 118) and Italy (A/C.6/68/SR.19, par. 2).

[244]Draft Conclusion 2-"Subsequent agreements and subsequent practice as authentic means of interpretation Subsequent agreements and subsequent practice under article 31 (3) (a) and (b), being objective evidence of the understanding of the parties as to the meaning of the treaty, are authentic means of interpretation, in the application of the general rule of treaty interpretation reflected in article 31 (…)".

[245]United Kingdom (A/C.6/68/SR.18, par. 16): "(...) the phrase "authentic means of interpretation" in Draft Conclusion 2 might not be appropriate, since in treaty terms, the word "authentic", which was often used when referring to different language versions of treaties, did not tend to have a particular technical meaning (…)". Greece (A/C.6/68/SR.18, par. 88): "(…) criticizing the distinction that the Commission seemed to operate between "authentic means" and "authentic interpretation", since all the means included in Article 31 of the Vienna Convention are "authentic" in the sense of having to be used to interpret the Treaty; Furthermore, based on an agreement between the parties, subsequent agreements and practices

interpretation related to the subsequent conduct by referring to the contemporary interpretation. We can speak of a reformulation that relates to subsequent conduct and to contemporary interpretation. It is a reformulation that is finalized and underlines in some way how the agreements and the subsequent practice contribute to the orientation of the choice between two interpretations and by assisting in the verification that the "presumed" intention of the parties was based on a term, which is connected with the evolution in time in the sense to explain the alleged intention which is ascertained through the use of all means of interpretation.

The purposes of all these arguments, divergences and, positions were the non-transparency to the preference of the ILC to lean towards one or the other type of interpretation by recalling the caution of the use of the subsequent conduct ending up with a support of an evolutionary interpretation. The same commentary highlighted the case-by-case approach of evolutionary interpretation that the majority of international courts adopt as part of an operation of an autonomous interpretative method and not as a normal process according to Article 31 VCLT (Dörr, 2018).

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constitute a constraint to a certain interpretation-"authentic", to be precise (…)".

Some states were positive with the Commission's choice to take an imprecise but flexible position[246], which requires the recognition of a modern interpretative choice, evolutionary in the specific case[247] despite the fact that for some of them it manifests a certain perplexity according to the expression used, i.e. "presumed intention"[248].

[246]Draft Conclusion 3-"Interpretation of treaty terms as capable of evolving over time". Subsequent agreements and subsequent practice under articles 31 and 32 may assist in determining whether or not the presumed intention of the parties upon the conclusion of the treaty was to give a term used a meaning which is capable of evolving over time.

[247]Mexico (A/C.6/68/SR.17, par. 127). Spain (A/C.6/68/SR.17, par. 137) in particular: "(…) the Commission must not extrapolate the specific jurisprudence of the European Court of Human Rights on two cases, which were very specific in their factual background and very complex in their analysis of intertemporal law (…)". United Kingdom (A/C.6/68/SR.18, par. 17). Germany (A/C.6/68/SR.18, par. 70). Romania (A/C.6/68/SR.18, par. 111). Italy (A/C.6/68/SR.19, par. 2). Russia (A/C.6/68/SR.19, par. 53).

[248]United States (A/C.6/68/SR.17, par. 43) stating that: "(...) the interpretative process must not investigate the intention itself but must be done by applying the means of interpretation set out in Articles 31 and 32 of the Vienna Convention, which in reality is not different from what the Commission also explicitly states, as seen (…)". France (A/C.6/68/SR.17, para. 120): "(…) the idea of the' presumed intention "of the parties did not reflect the commentaries, whose purpose was to between a contemporary approach and an evolutive approach to treaty interpretation (…)". Greece

However, other states have declared that the evolutionary interpretation is possible but under certain necessary conditions[249], especially as regards a certain intentional limit of an original nature from the same parts[250]. The reference to this method of interpretation is also used with the aim of tracing the relative boundary with the modification/amendment of a

(A/C.6/68/SR.18, para 93): "(…) attempts to identify the presumed intention of the parties upon the conclusion of the treaty by applying the different means of interpretation in articles 31 and 32 could be the intention of the parts and not the term itself (…)".

[249]Hungary (A/C.6/68/SR.18, par. 60): "(...) it was vital to provide the possibility, and not the obligation, to parties to a treaty to give a term used in the treaty a meaning which was capable of evolving over time through subsequent agreements or subsequent practice (…)". India (A/C.6/68/SR.19, par. 18): "(…) the evolutive interpretation of a treaty could not be merely a matter of the presumption of the intent of parties, unless there was a clear acceptance by the parties of such interpretation, particularly in regard to treaties that laid down the specific rights of each party and where such an interpretation might alter the core rights of a party (…)". Indonesia (A/C.6/68/SR.19, para 64): "(…) evolutionary interpretation should preserve the stability of the treaty and be based on the agreement of all parties-expressed in the case of subsequent agreements, implicit in that of practice subsequent - especially in the case of multilateral treaties (…)".

[250]Sud Korea (A/C.6/68/SR.18, par. 106), Cuba (A/C.6/68/SR.19, par. 28) e Iran (A/C.6/68/SR.19, par. 71): "(…) criticizing the approach taken by the Commission, lacking an explicit reference to the intertemporal question

subsequent treaty[251]. Thus the states have shown that the greatest caution of the same interpretative possibility is the evolution of a treaty[252] and/or its informally modification through subsequent practice, i.e. a problem that was addressed during the preparatory work of the ILC[253].

(…)".

[251]Sud Africa (A/C.6/68/SR.18, par. 43): "(…) proposing to consider that for some treaties the intention of the parties is such that a certain term is to be understood in the light of the circumstances valid at the time of conclusion, since subsequent agreements and practices can only indicate a possible modification of the intention of the parties, but certainly not in itself change the meaning of the treaty, but if the term is "by their very nature capable of evolving over time", as is the case for some categories of treaties (such as those on human rights), it would certainly be possible to have a "evolutionary interpretation", provided that this verification is done in concrete (…)". Slovakia (A/C.6/68/SR.18, paragraph 76): "(…) while subsequent practice was generally accepted as a means of identifying the original intent of It seems to be a question of the meaning of a subject with respect to a treaty or provision in a treaty was capable of evolving over time (…)". Iran (A/C.6/68/SR.19, para. 70): "(…) it was called subsequent practice and should not be confused with interpretation of treaties (…)".

[252]Thailand (A/C.6/68/SR.19, paragraph 24, recalling that: "(…) the Special Rapporteur bases his conclusion only on the opinion of judge Guillame in the case Costa Rica v. Nicaragua (…)". Malaysia (A/C.6/68/SR.19, par. 38): "(…) given that support for an evolutionary approach to the interpretation of

Subsequent practice and formation of parallel customary norms. Third report for the Study Group

With regard to the subsequent practice of a treaty and the practice as a substantial element that forms a custom, we can say that the third report for the Study Group dealt with them distinctly, considering for this scope carefully the previous reports of the Commission. The work of the Commission was not limited to the interpretative effect of the agreements and the subsequent practice, thus having to exclude the interpretative effect of the subsequent practice as a point of exclusion to any reference to customary law[254]. Especially the treaties of codification as it results from the "on occasion" distinction between the practice in

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the courts and tribunals' of treaty in order to avoid distorting or departing in any way from the letter and spirit of the treaty (…)".

[253]Spain (A/C.6/68/SR.17, par. 138): "(…) his delegation was not sure of the actual scope that might be attached to subsequent practice in cases which, for example, might result in the modification of the initial agreement being interpreted (…)". Belarus (A/C.6/68/SR.18, par. 5): "(…) while it was not feasible to draft a text that could, a priori, categorize international treaties as being evolutive, a useful guideline that set out the inadmissibility of an interpretation that would lead to the amendment of a treaty would be useful (...)".

[254]As evidenced by the change in the title, from "Treaties over time" to "Subsequent agreement and subsequent practice in relation to the interpretation of treaties".

its own declinations has to do with the interpretation of the treaties of formation of customs (Chang-Tung, Garcia, 2019).
An example was noted via Article 4 of the Hague Convention of 1930[255] regarding the conflict of nationality laws. This article affirmed that a state is not possible to act in diplomatic protection to defend its citizens to a citizen that its state acts against[256]. Thus this provision seeks to protect the equality of states considering customary norms especially after the Second World War in relation to diplomatic protection and providing for an exception to the prohibition of intervention for a state when a citizen of it has effective citizenship recognizing that such provisions also implement a certain habit[257]. According to the practice of some states that are party to the 1930 Convention, the interpretation of this Convention is qualified as "subsequent" and direct, however for other states the possible formulation of a custom has

[255]See: Convention on certain questions relating to the conflict of nationality laws. The Hague 12 April 1930.

[256]Article 4 of the Convention of Hague of 1930: "(…) A state may not afford diplomatic protection to one of its nationals against a State whose nationality such person also possesses (…)".

[257]Article 7 of Draft Articles on Diplomatic Protection: "Multiple nationality and claim against a state of nationality"-A state of nationality may not exercise diplomatic protection in respect of a person against a state of which that person is also a national unless the nationality of the former state is predominant, both at the date of injury (…)".

proceeded in a parallel way to evolve the treaty respectfully a customary law (Nolte, 2013).

As far as international humanitarian law is concerned, we immediately recall Article 85 of the Third Geneva Convention (Greenwood, 2008; Kretzmer, 2009; Grey, Shepherd, 2012; Crowe-Weston-Sceuber, 2013; Deuitch, 2016; Powell, 2017; Marxsen, 2018) which considers the relative obligation regarding the war prisoner that is persecuted in a penal manner according the laws of the state of detention for acts committed which precede his capture[258]. The later practice was established as a statement that the subject/individual loses the qualification of a prisoner of war who distinguished himself from civilians during a conflict. This norm is confirmed by Article 44 of the First Protocol and is recognized as a customary norm which is part of the International Committee of the Red Cross (Medlong, 2013)[259]

[258]Article 85 of the Convention of Geneve of 1949: "Offences committed before capture-Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention (…)".

[259]Article 44 of First Additional Protocol of 1977: "3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed

during the Study of Customary Humanitarian Law which many times refers to the practice of one state, i.e. Israel that is not part of the First Protocol[260].

In humanitarian law, the practice of using new technologies that focus on practice is appropriate, especially in the United States that are not part of the First Additional Protocol to the Four

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combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly: (a) during each military engagement, and (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate. Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of article 37, paragraph 1 (c). 4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed (…)".

[260]Rule 106 of the ICRC Study on Customary International Humanitarian Law States: "Combatants must distinguish themselves from the civilian population while they are engaged in an attack or in military operation. the right to prisoner-of-war status". See also: The commentary on the rule cites in particular a ruling by the Israeli Supreme Court that precedes the First Additional Protocol.

Geneva Conventions (Marxsen, 2018). Article 57 is a mandatory tool for the adoption of measures which can be characterized as "feasible" and avoid collateral damage to civilians as qualified by the ICRC itself, as customary in nature which recalls the practice of states which are not parties to the First Protocol. The United States is bound (as a party to the Convention) by the precautionary obligation which is set out in Article 2.3. of the Hague Convention of 1907 on Naval Bombardment (Tanaka, 2018)[261] and at the Naval Military Manual of 2007 which forms part of this obligation (Schmitt, 2017)[262]. This manual, as Nolte stated: "(...) could not be considered as "subsequent practice" to the 1907 Convention but rather as recognition of a customary practice that originates from the Additional Protocol of 1977 (Nolte, 2013). The practice of using the most advanced available device is a practice initiated by the United States which cannot be

[261]Article 2.3 of the Convention of the Hague of the 1907: "(…) if for military reasons immediate action is necessary, and no delay can be allowed the enemy, it is understood that the prohibition to bombard the undefended town holds good, as in the case given in paragraph l, and that the commander shall take all due measures in order that the town may suffer as little harm as possible (…)".

[262]See: The Commander's Handbook on the law of Naval Operations, Chapter 8 "The Law of Targeting", in particular: 8.1.2.1: "Incidental Injury and Collateral Damage".

successive to a treaty to which they do not participate. This practice is, however, followed by the states party to the First Additional Protocol, again verifying a parallel between the development of the interpretation of a treaty, on the one hand, and of customary law, on the other[263].

Another example is part of the non-refoulement principle according to Article 33 of the Convention relating to the Status of Refugees of 1951 and is recognized as a customary norm[264]. As Nolte argued it would be difficult to establish whether the conduct of a state party to the Convention constitutes a subsequent practice or a practice concerning the evolution of the customary norm. The distinction between the two declinations of the practice is identified in a 1965 dispute between the United States and Italy, in which the arbitral tribunal stated that the

[263]With particular reference to the NATO practice in Libya in 2011, in which the states parties have declared: "(...) that they have used the most advanced pointing systems: Nolte stresses that although it is not possible to identify the single states that are the authors of the bombing, the majority of NATO members are also part of the 1977 Protocol (Third Report, op. cit., p. 352) (…)".

[264]Article 33: "(…) Prohibition of expulsion or return ("refoulement")-1. No contracting state shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion (…)".

evidentiary threshold for asserting the existence of a customary rule should be higher than that sufficient for asserting the presence of a post-treaty practice[265].

Customary norms and treaties. Effect in practice of treaties

In customary treaties a particular perspective assumes state practice. In a coincident and exact way the practice forms customary norms and paves the way for an interpretation of the treaty that presents similar elements, as instruments of an informal nature through the states that are part of it and that can "govern" the legal constraints (Kohen, 2004)[266]. As far as the

[265]Interpretation of the air transport services agreement between the United States of America and Italy, 17 July 1965, par. 6.b): "It is correct that only a constant practice, observed in fact and without change can constitute a rule of customary international law (…) in the case in point the matter at issue is not to deduce a legal standard from the practice followed but merely to reveal the interpretation the parties gave to the provisions in dispute, which can serve as additional evidence in ascertaining the intentions of the parties and illustrate their intent as of the time the agreement was concluded. For this purpose a shorter period of continuity is sufficient (…)".

[266]According to Kohen: "(…) practice, in itself, represents the "safest means to relate the right to reality", since international law corresponds with what states do: the difficulty lies more in recognizing the passage to be to be, that is, in identifying a psychological element that, as hypothesized, is different,

effects of the practice on the treaties are concerned, the way in which the conduct of states is part of a treaty which affects the effective implementation of the conventional norms is verified. The temptation of the modality where state practice determines the formation and evolution of the principle of custom does not coincide with the conflict between the sources of law, given that it is a "codification", considered as an "evolving development"[267].

The evolution of a treaty is influenced by the same conduct of its states party, thus being able to describe an authentic interpretation with a certain meaning that it attributes to the treaty only as an auxiliary interpretative mean. Thus the parties in practice apply the treaty in a way that is not so close to the text of the convention allowing any other possible interpretation that is used by Articles 31-33 VCLT (Dörr, 2018). We also cannot speak

but always present, both for the customary process and for the authentic interpretation of the treaty (…)".

[267]"Using the term "codification" in the broader sense to include also the hypothesis in which the custom is generated by the treaty (as also recognized by the ICJ in the case of the Continental Platform of the North Sea), also the expression "progressive development" is used in a broader sense to refer to the evolution of international law, starting from such a condition of coincidence between conventional and customary norm, to arrive at another condition in which practice has made these norms different, modifying one (in hypothesis, the customary) (…)".

of a precise interpretation that recognizes the modification/amendment of each treaty. This is an expression of the informal modification that is different from the procedures that a treaty expressly prescribes[268].

A clear difficulty remains in identifying that the subsequent practice according to the former article 31.3.b), in view of the fact that the latter is based on the agreement between all the parties, is modified informally by the treaty and, requires a unanimous agreement for this type of modification[269]. This is a possibility that we clearly see in the following paragraphs as a hypothesis where practice modifies a treaty and forms a new custom. This also describes the interpretative and modifying effects.

[268]This consideration anticipates what: "(…) will be said with respect to the boundary between interpretation and modification, to be identified as a function of the Kelsen "interpretative ray", without however disregarding the concrete will of the parties (…)".

[269]It should be assumed: "(...) that the unanimous agreement of the parties is necessary for an informal change, as indicated in Article 38 of the 1966 Draft Convention on the Law of Treaties, and noted by the majority of the doctrine, however, some authors have denied this requirement (…)".

The interpretive effects in VCLT

The VCLT recognizes the subsequent practice according to Article 31.3.b) of the Convention including two concrete requirements. Iitially, it contains the agreement of all the states that are party to the relationship with the related treaty[270]. However, in the moment of the absence of an agreement between the parties, the first requirement, i.e. the practice of some states, as well as the second one, i.e. application of the treaty, affect the interpretation of it in both an auxiliary and a subsidiary way. We cannot say that there are also other forms that are recognized by the Convention itself, so it is difficult to place the two requirements in the practice of international organizations and/or to ta social level according to the conventional scheme.

Thus we consider the practice in a broad and (Mclachlan, 2013) not so precise way. A practise that is carrying its support to the evolutionary interpretation and is connected with Article 31.1., with good faith and, with Article 31.3.c) which has to do with the other rules of international law that are applicable to the parties (Gardiner, 2008; Arato, 2010; Simma, 2013; Moloo, 2013). In this case we specify that these are "parts" of a rule of intertemporal law as stated by judge Huber in the Palmas Island

[270]Article 31.3.b) VCLT affirmes that: "(…) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation (…)".

case of 4 April 1928 (Arabian, Kuch Negad, Babae, Ramin Nia, 2016), where we read that: "(...) the validity of the treaty should be assessed on the basis of the law in force at the time of its conclusion (principle of contemporaneity), but its valid application would depend on the rules in force at the time of its implementation (...)" (Kotzur, 2008)[271]. The ILC did not affect a rule expressly drafted by the convention despite the position proposed by the Special Rapporteur Waldock himself who went that route[272] but consider its components as a general rule of interpretation (Gardiner, 2008)[273]. Already the Commission itself

[271]Island of Palmas, award of 4 April 1928, p. 845: "(…) a juridical fact must be appreciated in the light of the law contemporary with it, and not of the law in force at the time when a dispute in regard to it arises or falls to be settled (...) the same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of law (…)".

[272]Art. 56 of Project of 64: "The inter-temporal law-1. A treaty is to be interpreted in the light of the law in force at the time when the treaty was drawn up. 2. Subject to paragraph 1, the application of a treaty shall be governed by the rules of international law in force at the time when the treaty is applied (…)", Yearbook of the ILC 1964, Vol. II, p. 8-9.

[273]According to Gardiner: "(…) the principle of good faith ex 31.1 VCLT and the one indicated in article 31.3.c (…) sometimes referred to as "systematic" interpretation) represent precisely the two components of the

in its report on the fragmentation of 2006 confirmed the relative presumption of a contemporary interpretation without however denying the examination of the circumstances which thus justify a type of interpretation that is not static, but precise and at the same time dynamic[274].

Evolutionary interpretation and subsequent practice

The subsequent practice was recognized through the VCLT and recognized as an attribution to the evolutionary interpretation of a treaty. Informal amendment extends the meaning of the treaty by

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intertemporal right rule.Note, however, that the other rules in force constitute criteria here interpretation of the treaty, rather than rules that are potentially prevalent or subordinate to it (…)".

[274]A/CN.4/L.682, par. 478: "(...) the starting-point of the argument might plausibly be the "principle of contemporaneity" (…) with regard to the normative environment as it existed at the moment when the obligation entered into force for a relevant party. When might the treaty language itself, in its context, provide for the taking account of future developments? , thus offering some examples of "indicators" of the possibility of interpreting evolutionarily: use of a term "not static but evolutionary" (ie without definition or revealing a "program of progressive development", in relation to the object and purpose of the treaty), or description of obligations with general terms (which therefore require to be interpreted in the light of other current regulations) (…)".

means of an interpretation that informally and least modifies such an amendment as may be considered by a court. Nolte already stated that: "(...) the subsequent practice was indicated as an interpretative criterion capable of determining the same result as an evolutionary interpretation, by virtue of the decision of the ICJ in the Costa Rica v. Nicaragua case (…)". In his separate opinion, judge Skotnikov in fact reached the same conclusion as the majority of the Court, which had interpreted a term evolutionarily, based on the subsequent practice of a state to tolerate a certain use by the counterparty (...)".

At this point we must distinguish that the evolutionary interpretation is actually a modality that uses the interpretative criteria which is based on the intention that a treaty can evolve in tempis and the ordinary meaning of a term can change, i.e. the object, the purposes of a treaty and, the general rules of international law[275]. These elements, as well as the subsequent practice, will be able to identify the content of an evolutionary interpretation which constitutes the subsequent intention of the parties until the treaty can thus evolve (Moloo, 2012; Moloo,

[275]That is: "(…) factual or legal elements that determine the content of the evolutionary interpretation, while the first and third paragraphs, letter c) of Article 31 VCLT, mentioned above, would rather be its legal basis; in this light, the will of the parties that the treaty evolves could qualify as an "essential requisite" of the evolutionary interpretation (…)".

2013). It is an interpretation that is based on the subsequent practice pursuant to Article 31.3.b) VCLT which distinguishes the interpretation that can be qualified as "evolutionary" thus highlighting that the parties maintain greater control over the treaty that can influence (Arato, 2010).

It is true that the advantages for an evolutionary interpretation are greater and respect the need to demonstrate an informal modification of a treaty. Such a treaty is applied in a different way given that the term has changed its ordinary meaning including the object and the purposes of the treaty which by now have another type, characterized and based on the same practice (Mclachlan, 2013)[276], which is certainly more calculable before a court and certainly more appreciated by the party to a dispute who respects the acknowledgment of the practice of a source which modifies the contractual obligations. Thus the framework of the informal amendment is feasible as a ratio extrema which is also adopted by the ILC[277] itself and which takes into

[276]An example: "(...) could be given by the "living instrument" theory applied by the European Court of Human Rights, ie the dynamic interpretation of the ECHR also based on the normative tendencies of the states parties (without proving the unanimous agreement), or on the social ones (though reflected in the legislation) (…)".

[277]By expressly indicating in Conclusion 7.3: "(...) that the intention of the parties to interpret the treaty should be presumed, rather than that of

consideration the attempt to consider as "interpretations" the applications of a treaty that is far from the letter of its text (Murphy, 2013). This highlights the evolutionary interpretation of the treaty which is based on the will of the states which respects the original intention which is part of a subsequent will[278].

(Follows): Informal amendment

Article 38 of the Project of VCLT, which considered the second report of the ILC[279], is treated as a single article which (according to the VCLT) is subjected to a vote removing the text of the

modifying it: (…) it is presumed that the parties to a treaty, by an agreement the treaty, meaning to interpret the treaty, not to amend or to modify it (...)" (A/CN.4/L.874, p.3).

[278]Intention: "(...) typically based on the use in the treaty of terms capable of evolving, generally described obligations, etc. It is clear that when it is the next practice to indicate that an evolutionary interpretation is possible (constituting the foundation rather than the content), it will be a subsequent will, as in the case of an informal change (…)".

[279]The article affirmes that: "(…) modification of treaties by subsequent practice. A treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions (…)". Yearbook of the International Law Commission, 1966, Vol. II, p. 236.

Convention[280]. We recall that in the previous Draft of the Commission which is part of the distant 1964, some methods of amendment and modification of the treaties were recognized. Let us recall the case that a subsequent treatise on the same matter. The means of subsequent practice and of a new custom[281] are the means of informal modification. A first hypothesis for a future amendment of a treaty is based on Article 30 VCLT which in reality takes as its basis the relative priority of the norms which are now part of the second treaty[282]. The other hypotheses just

[280]The proposal was from Finland, Japan, Venezuela and Vietnam (A/CONF.39/C.1/SR.37, par. 57 ss).

[281]Yearbook of the International Law Commission, 1964, Vol. II, p. 198: "Article 68. Modification of a treaty by a subsequent treaty, by practice or by customary law. The operation of a treaty may also be modified: (a) By a subsequent treaty between the parties relating to the same subject matter to the extent that their provisions are incompatible; (b) By subsequent practice of the parties in the application of the treaty establishing their agreement to an alteration or extension of its provisions; or (c) By the subsequent emergence of a new rule of customary law relating to matters dealt with in the treaty and binding upon all the parties (…)".

[282]Article 30 VCLT: "Application of successive treaties relating to the same subject-matter-1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of states parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs. 2.When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty,

mentioned, are indicated explicitly (Cot, 1966)[283]. Article 68 forms an evidence that an informal modification/amendment by means of a subsequent state practice is possible to held and implement through the formation of a new customary rule.

Thus the ILC has taken into consideration the informal modification as a "generally recognized" element[284] which

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the provisions of that other treaty prevail. 3.When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the latter treaty. 4.When the parties to the later treaty do not include all the parties to the earlier one: (a) as between states parties to both treaties the same rule applies as in paragraph 3; (b) as between a state party to both treaties and a state party to only one of the treaties, the treaty to which both states are parties governs their mutual rights and obligations. 5. Paragraph 4 is without prejudice to article 41, or to any question of the termination or suspension of the operation of a treaty under article 60 or to any question of responsibility which may arise for a state from the conclusion or application of a treaty, the provisions of which are incompatible with its obligations towards another state under another treaty (…)".

[283]The second one: "(...) was transposed in the Article 38 of the 1964 Project, with the result, the third one was removed because it was considered not within the theme of the law of the treaties. In the events of article 68 (...)".

[284]In Conclusion 7, paragraph 3, second sentence of the work on agreements and subsequent practice: "(…) the possibility of amending or modifying a

excludes the jurisprudence of the ECtHR as a single case which concerns a right, for example fundamental, which has to do with that of life and which is part of the ECHR[285]. As regards the ICJ, according to previous reports, the Study Group and Nolte affirmed that: "(…) the court would in fact have admitted the informal modification of some treaties, in particular those establishing international organizations (not least that foundation of the United Nations) and those of setting borders". It is recognized that the treaties establishing international organizations (and the Charter of San Francisco in particular) would be more susceptible to informal modification (Engel,

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treaty by the subsequent practice of the parties has not been generally recognized (…)". (A/CN.4/L.874, p.3).

[285]This is the case of the 2010 Al Saadon: "(…) the Court of Strasbourg considers the Article 2 ECHR (right to life) to be changed in practice in the sense that the death penalty is no longer a legitimate exception, since it is now banned even in times of peace (…). Article 3 of the ECHR (prohibition of inhuman and degrading treatment) can be interpreted as prohibiting the transfer of a prisoner to states where there is a risk of application of the death penalty. This is a special case in which the right to life is ultimately threatened (although the decision concerns the interpretation of article 3), and already, in the same terms, assessed by the court in two previous cases (Soering 1989, and Ocalan of 2005), where, however, the informal change remained hypothesized only in the abstract (being in fact intervened according to the formal procedure of the Additional Protocol) (…)".

1953; Kuijper, 1998), in particular due to the absence of a real power of judicial review or politics (Engel, 1965; Blum, 1993)[286], and despite the noted difficulty of recognizing in the practice of the organization a "subsequent practice" pursuant to Article 31.3.b) VCLT (Dörr, 2018).

The relevant conclusion adopted by the ILC excludes the possibility of an informal modification since the final clause leaves this possibility to customary international law[287]. It is

[286]In the sense: "(...) that within the UN there would be no authority that judges about the illegality of the change, ie missing the judicial review (save the possibility of asking opinions to the IGC or, in case of dispute, a ruling valid only between the parties) that the political review (save the possibility of expulsion or of measures ex Chapter VII if found a "threat to peace"): the change could not institutionally constitute "iniuria", the idea is of Engel (...) which recognizes a greater role to the ICJ, especially when the interpretations on the part of this are confirmed by a resolution of the General Assembly (…)".

[287]Conclusion 7.3: "(...) of the work on subsequent agreements and practices, in addition to indicating, as noted above, a presumption that the intention of the parties manifested by the conduct subsequent to the conclusion of the treaty is to be understood as interpretative rather than amending, ends with a clause without prejudice to the provisions of the Vienna Convention and, above all, to customary international law: The present draft statement is without prejudice to the rules on the amendment or the treaties under the Vienna Convention on the Law of Treaties and under customary international law (…)". (A/CN.4/L.874, p.3).

understood that a customary rule permits the modification of the treaty by means of subsequent practice. This practice is evident in a sufficient number of cases which the parties in practice have modified a treaty by the subsequent conduct of their own conclusion. This happens frequently and outside of a judicial assessment (Murphy, 2013), because it is normal that a precise agreement of a modifying nature does not generate a real controversy (Dinstein, 2006; Villiger, 2011; Alvarez, 2013) despite the informal changes that we see for example in the case of the San Francisco Charter in relation to articles 27[288] and 12[289]

[288]Par. 3 affirmes that: "Decisions of the Security Council on all other matters shall be made by an affirmative vote of seven members including the concurring votes of the permanent members (...)". The ICJ has afirmed in the case of opinion of Namibia of 1971 (par. 22): "(…) the proceedings of the Security Council extending over a long period supply abundant evidence that presidential rulings and the positions taken by members of the Council, in particular its permanent members, have consistently and uniformly interpreted the practice of voluntary abstention by a permanent member as not constituting a bar to the adoption of resolutions (…)".

[289]The 1st paragraph affirmed that: "(…) while the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests (…)". The ICJ has recognized in the case Wall of Palestine of 2004 (par. 27): "(…) as regards the practice of the United

where the ILC itself has taken a position of a consultative nature. Thus an international court can decide each individual case that arises as an investigating international practice with the aim of ascertaining the customs that are applicable to each concrete case (Bodansky, 1995).

For the opinio juris we cannot rely on the constitution of jurisprudence which definitively tries to prove the non-existence of a custom. This allows the informal modification to an interesting part which denies the same possibility in an abstract way and with objective of denying the amendment of a precise case[290].

Nations, both the General Assembly and the Security Council initially interpreted and applied article 12 to the effect that the Assembly could not make a recommendation on a question concerning the maintenance of international peace and security while the matter remained on the Council's agenda (…). However, this interpretation of article 12 has evolved subsequently (…). Indeed, the court notes that there has been an increasing tendency over time for the General Assembly and the Security Council to deal in parallel with the same matter concerning the maintenance of international peace and security (see, for example, the matters involving Cyprus, South Africa, Angola, Southern Rhodesia and more recently Bosnia and Herzegovina and Somalia) (…)".

[290]In the sense that the conduct of the state within the single dispute could not constitute proof of the opinio juris of the state in the normality of the cases.

The ILC has always tried to codify customary norms based on a jurisprudential support that is directed mainly to the states that are part of the Sixth Commission of the General Assembly. The states have judged positively that an ambiguous text such as the one we read in the conclusion 7.3. has to do with the work of a subsequent practice and to related agreements. Going in the opposite direction (Hafner, 2013) the Vienna conference which removes Article 38 testifies that the states are in fact divided in various positions given that the majority of them favorably express the elimination of the article and the minority adds up the against and abstentions votes[291].

The content of the opinion juris, as a condition of an informal modification must be rigid, specifying an unanimous and not dissimilar agreement as stated in Article 31.1.b) VCLT (Dörr, 2018). This type of modification is not so much supported by all the parties to a treaty as can be seen and expressed in this sense in Article 38 of the Project of 1966[292].

[291]The opinio juris of the states concerns the existence in the customary international law of a provision allowing the following practice to amend the treaty in an informal way, but reducing the limits in the possibility of deriving the opinion of a state from the exercise of the right to vote.

[292]Adopting an even more stringent formulation of the then article 27.3.b) on the following practice as a means of interpretation: "(…) Any subsequent practice in the application of the treaty which establishes the understanding

The agreement thus constitutes a necessary element for the relative modification (Cot, 1966; Engel, 1967; Zacklin, 1968; Lennard, 2002), although not everyone agrees with this position (Akehurst, 1975; Mcginley, 1985; Liang, 2012)[293] and also because it is admitted that the existence of a custom or principle authorizes the informal modification of a treaty (Weisburd, 1988; Gardiner, 2008; Feldman, 2009; Liang, 2012)[294]. It is a position that Waldock has commented on in the relative removal of article 382[295]. It should be noted that similar modifications occur for

of the parties regarding its interpretation (…)". Yearbook of the International Law Commission, 1966, Vol. II, page 181, while article 38 spoke of "subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions (…)".

[293]Akehurst, stating that: "(...) in the case of the United Nations the majorities envisaged for formal amendment procedures would be sufficient (…)". Mcginley, noting that: "(...) the ICJ seems to detect a "consensus" to change the treaty even in the presence of the opposition of one or more parties, denying the change only in the presence of a "high opposition" (…)". Liang, preferring: "(...) a "falling short of unanimity" test, for example the "common, concordant and consistent" practice in the WTO , as it is sufficient to avoid an "imposition on minorities" (…)".

[294]Gardiner, "(…) actually speaking of a "principle" of international law (…)". Weisburd: "(…) the evolution of the law of the sea from the 70s is proof that the practice can modify the treaties (…)".

[295]Asserting that it is a corollary of the principle of good faith: "(...) he was surprised that some delegations should think article 38 constituted a quasi-

each title that has a temporary nature (Engel, 1953; Liang, 2012) and/or has minimum weight on a treaty (Liang, 2012; Nolte, 2013). For some, changing the rights and obligations of a state(s) party(ies) is better than a radical change to the whole treaty (Hafner, 2013; Moloo, 2013). Thus a path is adopted where informal modification is in fact possible above all for the reasons that we have already noted in the previous paragraphs (Kohen, 2013)[296]. The modification by means of a practice becomes a custom in the following moment which is different and which clarifies in an imaginary way the general custom which is affirmed as a multilateral treaty and which a contrary conduct is foreseen without recognizing that the treaty which has been

violation of the principle pacta sunt servanda, especially as the legal basis of the article was good faith. The provision was based on the principle that a state which had taken up a position on a point of law, particularly in the interpretation of treaties, and allowed another State to act in accordance with that understanding of the legal position, could not go back on its representation of the legal position and declare the act performed illegal. Consequently, the criticism that the article was contrary to the principle pacta sunt servanda could not be accepted (…)". (A/CONF.39/C.1/SR.38, par. 56).

[296]In particular the recognition by the European Court of Human Rights and the spaces left open by the Commission in the Conclusion 7.3 of the work: "(...) on subsequent agreements and practices, in addition to a discrete doctrinal support: among the texts analyzed, explicitly denies the possibility of a informal modification (…)".

modified previously is informally modified. Custom calls for a general conduct that accepts the parties of the treaty they undertake. The parties also unanimously accept the new general conduct that is contrary to the binding treaty, that has been amended informally before the related custom is established[297].

From modification (through practice) to customary law

It is clear that a custom is "above" a treaty where the absence of a certain hierarchy between the sources of international law and the necessity that resolves conflicts of rules on the basis of the principle of specialty is concentrated on a factor that has a chronological nature. Nothing excludes the possibility that a customary norm prevails over a content that differs from a previous treatise (Kunz, 1953; Jia, 2010; Shaw, 2017). The Vienna Convention does not explicitly indicate the relationship between custom and treaties except from article 38. In this a treaty becomes customary and applies to third countries respecting its relative ineffectiveness as well as the scope of the

[297]This is clearly not an obligatory passage: as clarified in the following paragraph, the parties to the treaty could continue to apply the provisions among themselves, though contrary to the customary occurrence, as persistent objectors, or supporting the existence of a particular custom (born of the treaty).

contracting parties.

Reading and focusing on Article 64 VCLT we understand and see the possibility that a treaty is terminated due to a supervening mandatory rule (Sommerfeld, 2019)[298], such as a rule which it mostly uses mandatory and customary norms (Schachter, 1989; Wolfke, 1993)[299]. What can be understood is the hypothesis where the generality of states takes into consideration the customary value of a practice which affirms the content that is contrary to one or more treaties and which prevails over these through the relative modification. The ILC recognized via Article 68 of the 1964 Draft that the treaty which is modified by a supervening custom is the case that it uses the term modification/amendment as a subordination of a treaty to subsequent custom since their effects remain the same[300].

[298]Article 64 VCLT: "Emergence of a new peremptory norm of general international law (jus cogens)-If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates (…)".

[299]Thirlway, stating: "(...) that normally, perhaps necessarily, the binding right is customary (…)". In the opposite direction Wolfke, stating: "(...) on page 14 that such rules are not actually disseminated in practice, rather deriving from treaties (...)"

[300]As evidenced by the preparatory work of the Vienna Convention: the '64 project provided for in article 68 that a subsequent treaty on the same subject" modified: "(...) but the Commission considered the question

We can consider different situations where the point of view of the participation of the contracting states which are part of the practice play an important role in the formation of a custom. In these cases they do not participate actively and the new custom of a general nature equally affirms the basis of the practice that comes from other states, i.e. from the acquiescence of the states that are party to a treaty (Liakopoulos, 2022). Thus it is understood that in an immediate way each state agrees to a future modification of the law which is in force between them[301]. By avoiding ugly and negative consequences the parties of a treaty continue to apply a rule which is different respect the nascent custom where the parties to the treaty and the hypotheses continue to apply the provisions among themselves qualifying thus the persistent objections (Jia, 2010; Green , 2016)[302].

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already absorbed by the then article 63, which spoke of "prevalence" of the subsequent treaty (…)". Yearbook of the International Law Commission, 1964, Vol. II, p.186): "(...) this article became the 26th of the project of the '66 (…)". Yearbook of the International Law Commission, 1966, Vol. II, pp. 214), and the current Article 30 VCLT.

[301]"(…) Or the "prevalence" of the new custom on the treaty. For example, it may be assumed that the parties to the treaty have exhausted their interest in a certain provision (perhaps a ban), in the light of a new emerging practice (permissive, compared to the original ban) (…)".

[302]The possibility of the persistent objection is recognized by the Commission in the work on the identification of customs, in Conclusion 15

Speaking of persistent objection we mean that the parties of a treaty do not collect the necessary number to be able to prevent the generation of custom with their own protest which prevents the affirmation of a general practice (Elias, 1996; Egede, 2013; Thirlway, 2018)[303]. The element of objection persistence is satisfied through the continuous recognition of the conventional obligation. The continuous implementation of a treaty constitutes a certain "protest" towards a new practice which is different from

[16]: "Persistent objector-1. Where a state has been objected to a rule of it is not opposable to the state concerned for the long-term maintenance of the objection 2.The objection must be clearly expressed. (A/CN.4/L.872, p.4). In doctrine it has been emphasized that the persistent objection and the particular customs (see a little later in the text) would be the only way for the contracting states to avoid a custom born from the treaty (while here the case is that of a custom that modifies the treaty, however, it cannot be ruled out that the two exits are equally valid as such (…)".

[303]"(…) Since there is no "critical" number of states that meets the requirement of general practice, it is not possible to indicate how many states can become persistent objectors before this requirement disappears; some doctrine, however, recalls that the rule constitutes (also) a form of protection of minorities (therefore a group of states, such as the communist block after World War II (…)". Thirlway referring: "(…) to the opposition of the minority of nuclear-armed states to the customary prohibition of such armaments, as recognized by the ICJ in its 1996 opinion (…)". Elias states: "(...) that in case the objection comes from "more" states the nascent custom will be particular and not general (…)".

it but also for the fact that the treaty is widespread and clear and since the practice as a whole is sufficient, general and uniform.
As regards the acquiescence that is noted between the contracting parties, we can say that alternatively the treaty does not appear to be modified given that the new custom is particular and is based on the practice of the conventional provision which is supported by an opinion juris which has effective nature and respects the scope of the group of contracting states[304]. Thus a subsequent custom arises from the treaty having general and external character. In this hypothesis we are faced with two particular customs in the dimension of a group of states that are linked to each other. And the third one respects the treaty which is in contrast with the one represented by the states that are part of it as contracting parties (Elias, 1996; Kolb, 2003; Jia, 2010; Crawford, 2014).
A third way open to the parties of a treaty follows its rule including a new one following the newly formed custom which

[304]"(…) The possibility of a particular custom is admitted by the Commission, which expresses it in the Conclusion 16 of the work on the identification of the custom: "Particular customary international law-1. A rule of particular international law, whether regional, local or other, is a rule of customary 2. It is necessary to ascertain whether there is a general practice in the United States concerned that is accepted by the law (opinio juris) (…)". (A/CN.4/L.872, 4).

prevails as lex posterior, where legal certainty safeguards the written rule. The custom was formed on the basis of the practice that comes from the part of the contracting states. If this is true, at the moment the practice comes from the parties, it modifies the treaty in an informal way and in reality the custom which consolidates the generality of the states. Thus we intend as further proof the mechanism of an informal modification which is possible even in the abstract to similar hypotheses which need the requirement of a unanimous agreement. The hypotheses of informal modification and modification through a subsequent custom essentially form a character of a psychological element, i.e. an agreement in the first phase and the opinio juris in the second one. This is an orthodox position of the psychological element in custom where non-consent is characterized as "a conviction of legality" (Zemanek, 1995; Crawford, 2014)[305].

[305]Zemanek affrms that: "(…) an international (general) custom needs a psychological element, qualified as opino juris sive necessitatis, has been indicated in the field of international law by Rivier in 1896, by Von Liszt in 1898 and by Geny in 1919, on the basis of the idea of Volksüberzeugung advanced by the German historical school between the eighteenth and nineteenth centuries, exactly as opposed to voluntarism (and also to the traditional idea of "long custom", requiring long-term practice). According to Crawford: The idea of "conviction" that conduct constitutes a right or obligation is confused with that of "acceptance as a right", adopted at/by the same Commission: The special rapporteur Wood had instead preferred the

The inability to make such a distinction is found in the formative moment of the norm as a true opinio juris which is understood as a conviction where the legality of the behavior into the already existing norm where the state is in error is taken into consideration (Kunz, 1953; Kolb, 2003; Mathias, 2016; Kammerhofer, 2017)[306]. The formation of the norm would be necessary to include an element of will, a tacit consent (Macgibbon, 1982; Zemanek, 1995; Arangio-Ruiz, 2007;

second formulation, without initially referring to the expression "opinio juris". See the second report for the Commission, (A/CN.4/672, par. 65-66). The idea of "conviction" can be found in the case law of the ICJ in the case of the North Sea continental shelf (paragraph 77): "(…) a belief that this practice is made obligatory by the existence of a rule of (...) such a belief, i.e., the existence of a subjective element, is implicit in the very notion of the opinio juris sive necessitatis (…)"; and in Nicaragua (paragraph 207, recalling the first), but already in that of the Permanent Court of International Justice in the Lotus case (referring to page 28): "only if such abstention were based on their being aware of having a duty to abstain and would be able to speak to an international custom (…)".

[306]As already noted by Kelsen: "(...) there is a paradox whereby the first agent state could not be convinced of the juridical nature of their (new) conduct, if not admitting that they are in error (…) overcame the paradox by admitting that a psychological element is necessary to distinguish a juridically bound practice from simple courtesy, and that it would be identified in the belief about the existence of a bond (not only legal, but also moral or any (…)".

Tasioulas, 2007)[307]. The supervening custom thus modifies the treaty in force as a new opinio juris which is in contrast with the informal modification of a treaty and by taking part of an unanimous agreement. Such a difference is identified in the psychological element and is difficult to be ascertained in practice. Thus we can think of the hypothesis of a treaty that is modified by a subsequent custom and/or to the psychological element that is akin to a consensus that respects the general custom (Cheng, 1965; D'Amato, 1971; Müllerson, 1998; Yee, 2015; Deplano, 2017)[308].

[307]Macgibbon affirms that: "(…) opinio juris in the proper sense can subsist only when the custom already exists, therefore having to resort to a consensualistic/voluntary theory to explain its formation, is supported by Macgibbon: indicating consent as a sufficient condition to create the constraint for the State that lends it (…)". Zemanek, also underlining: "(…) that international jurisprudence supports both the idea of the psychological element as "belief" and "consent/acceptance (…)". Tasioulas: "(…) speaking of a "disjunctive" conception, or double, of opino juris (...)". Wood: "(…) In his second report, preferred to use the expression "acceptance as a right", which, as underlined by the ILA (Final Report of the 2000 London Conference: Statement of Principles Applicable to the Formation of General Custom 30), allows us to convey both a constitutive "idea" (consent) and a "declaration" (conviction) (…)".

[308]That particular customs "resemble tacit agreements (for which they would in effect be based on consensus) was supported by Cheng. D'Amato having

The informal modification produces the existence for a custom that certainly evolves the norm in a future time. It is an informal modification where the very content of the rule continues to remain available to the parties who agree to the modification that passes through their unanimous agreement. To establish the legal source of the obligation itself, the agreement modifies in a tacit way the subsequent practice (Adoua-Mbonga, 2021). Thus a certain second possibility is recognized which has the task of judging the controversies arising from the treaty concerning its content and the obligations of new states that are party to it[309].
When the modification of a treaty is determined by a new custom, it is thus necessary to distinguish whether it concerns a general or a particular custom. Only in the case of particular custom do the parties to the treaty maintain control over the rule thus trying to modify the new practice which accepts the law.

to deduce that even the general habits are based, in fact, on consent (…)". Müllerson affirms that: "(…) The consent is sufficient to create a bond between some states, which then "like a snowball" spreads throughout the international community creating a general custom (…) not focusing on the particular habits, it is stated that they can be based on consensus (…)".

[309]Problems of jurisdiction in case of informal change of a treaty establishing international organizations have been highlighted by Nolte in his first report for the Study Group. "The uncertainty of the obligations that would weigh on the states wishing to adhere to an informally modified treaty (…)".

Even incidentally, it is not denied that the treaty was modified in an informal way and that the same practice is accepted as a right. It stands out that the unanimous agreement is necessary for an informal modification where the psychological element of a particular custom can be extremely "rigorous" in its own way (Alland, 2021)[310]. A complex level is part of the recognition that comes from a particular custom inter se between treaty parties that modify treaty obligations. In this case the informal modification of the treaty and the agreement is not unanimous in nature but of a form of tacit agreement, as support of a particular custom that cannot be denied (Cot, 1966; Gardiner, 2008; Maloo, 2013; Evans, 2017; Thirlway, 2018)[311]. If the custom is modified

[310]If the thesis is based on consent, the modification through a subsequent particular custom is based on an informal tacit agreement, of the same type as that necessary for an informal change.

[311]Article 41 VCLT recognizes the possibility of a cross-over amendment if certain formal requirements are met. The possibility could not therefore be denied to states to achieve the same result informally, i.e .not to change the treaty (as it would require unanimity, ex Article 39 VCLT), but some obligations deriving from it, through a custom, certainly of particular scope and based on a tacit agreement. It is recalled that Waldock, on the occasion of the draft law on treaties of 1964, highlighted as that between some parts only it would be the most frequent hypothesis of informal modification, pronouncing to expressly distinguish the unanimous modification from the inter where, as there were two articles on the unanimous amendment and the

it means that it has general value and remains as a subject since it is chronologically previous.

Let us not forget the case of desuetudine which is recognized as a cause of extinction for treaties and customs given that it is unanimous in its qualification (Wouters, Verhoeven, 2011). Thus it is underlined that it is in fact a type of "negative" custom which has arisen requiring from states to not abandon the prescribed conduct but to recognize the legality of the new situation (Kohen, 2004; Dinstein, 2006; Bederman, 2010)[312]. Desuetude is a cause for the extinction of treaties from a "mutual dissent" which is provided for by Article 54 VCLT, as implicit dissent in practice (Weisburd, 1988)[313]. It is preferable to place

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inter one if here it was preferred to resort to the particular custom, which in the absence of unanimous agreement would seem to be the only legal source capable of producing an effect amending. Maloo, seems to identify this as the true hypothesis of informal "modification", since it involves only some parts. "Amendment" would be the term to be used in the case of a unanimous agreement, even tacit agreement. In the opposite direction, Article 41 VCLT highlights the necessity of the formal constraints.

[312]It would not be enough a "negative" practice (of abstention with respect to obligatory conduct) to extinguish the norm, but it should be accompanied by a psychological element. Consequently the previous norm should not be applied anymore. Kohen talks to the desuetudo "as the extinction of habits (…)".

[313]Article 54 VCLT affirmes that termination of or withdrawal from a treaty

the case underlining the affinity of desuetude where the hypothesis of a supervening custom modifies the treaty. Thus the connection with article 54 thinks of a disagreement that is unanimous and tacit bringing desuetude closer to an informal modification that is based on a unanimous and tacit agreement. Even so the result remains the same. The hypotheses are based on a particularity of international law where a new type of law arises from the violation of what already exists (Akehurst, 1975; Danilenko, 1988; Weisburd, 1988; Schachter, 1989; Greig, 1992; Zemanek, 1995; Postema, 2007; Bederman, 2010; Kammerhofer, 2012; Kadens, Young, 2013; Crawford, 2014; Starski, 2015)[314].

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under its provisions or by consent of the parties - "The termination of a treaty or the withdrawal of a party may take place: (a) in conformity with the provisions of the treaty; or (b) at any time by consent of all the parties after consultation with the other contracting states (…)".

[314]As expressed by the maxim "ex iniuria ius oritur", recognized by the ICJ in the Nicaragua v. United States case. Merit, para 207: "(…) Reliance by a novel right or an unprecedented exception to the principle rnight, if shared in principle by other states, tend to a modification of customary international law (…)". Akehurst, affirms: "(…) that customs can change due to the effect of declarations, regardless of the belief that underlies them (…)". Zemanek, specifies: "(…) that everything clearly depends on the reaction of the other states (…)". Kammerhofer affirms that: "(…) clarifying what constitutes "violation" on the level of the substantive norm can, on the meta normative one, constitute an element of a new custom (…)".

What boundaries are there between modification and interpretation?

The question as well as the approach on the topic between the boundaries of modification and interpretation concern the conventional source between a text that can be interpreted and the criteria that are recognized for carrying out this operation. To give an answer to this question we refer to Kelsen principles. Indeed, Kelsen's principles speak of interpretation only when the meanings are reasonable to assign to the relevant available text. Outside this scope it is recognized that the modification is distant between the applied rule and the provision (Hexner, 1964). Thus Kelsen allows us to understand that he attributes an authentic effective interpretation which comes from the same authors of the treaty itself and who are capable of replacing the interpreted norm (Feldman, 2009; Kammerhofer, 2012; Arajärv, 2013; Beham, 2018)[315]. The subsequent practice is regulated by Article 31.3.b) VCLT and is defined by the Commission where it is presented as a mean[316] which constitutes an authentic criterion of

[315]Kammerhofer states: "(…) that a "truly" authentic interpretation (…) would no longer be a mere interpretation, leaving perhaps to suggest that it should be considered a modification (…)".

[316]In the commentary on Article 27.3.b) of the 1966 Project, we read: "The

interpretation (Di Stefano, 1994). Thus the boundary between authentic interpretation and modification is characterized and oriented through the practice of the contracting states[317].
This type of argument identifies the relative border that exists and that falls within the text of the law (Wolfke, 1998) as an interpretation that remains sub lege and not contra legem (Bernhardt, 1967; Zacklin, 1968). Thus the meaning attributable to the provision of the letter of the treaty is broadened by including the interpretative criteria that are identified in Articles 31-33 VCLT (Moloo, 2013). It is a field that includes numerous and sufficiently flexible possibilities of interpretation. Evolutionary interpretation also recognizes that the terms used in a treaty have a different meaning from the one attributed to the time of its conclusion. The relative border traces and shifts the broad scope of an evolutionary interpretation.

Commission considered that subsequent to the understanding of the parties regarding the interpretation of a treaty should be included in paragraph 3 as an authentic means of interpretation alongside interpretative agreements (…)". Yearbook of the International Law Commission, 1966, Vol. II, page 222: "(…) remember that this definition applies to all the interpretative criteria referred to in article 27 (…)".

[317]In the commentary on Article 38, of the 1966 Project we read: "although the line may sometimes be blurred between interpretation and amendment of a treaty through subsequent practice, legally the processes are distinct (…)". Yearbook of the International Law Commission, 1966, Vol. II, p. 236.

By speaking of treaty modification we mean the intervention that is possible to resolve the question of its application, i.e. the cases that limit the interpretative means that are not sufficient. A similar solution is adopted by the ILC itself on agreements and subsequent practice which expressly recognizes the possibility that a treaty can be modified through subsequent practice. The uncertainty concerns the hypothesis that is concentrated in the specific problem of identification where the boundary between interpretation and modification reveals the intention of the ILC as an extensive modus of the interpretative margin (Buga, 2018). The voluntary and modifying interpretation of the parts also brings about possible effects where the means of interpretation according to article 31.3. are determined in an extended way. There is no expressive analysis that is necessary for the ILC to separate the interpretation and the modification that are placed beyond the limit of the text of the treaty, i.e. as a modification that recognizes the extrema ratio and/or as an ad hoc operation of a treaty which it cannot in any way explain the whole range of means of interpretation that are available.

This is a precautionary protection where the ICJ used to state that the informal modification of the treaty and the stringent limits with the VCLT generally regulate the amendment referring to a

necessary agreement of all parties[318]. We can reiterate that the ICJ, faced with a certain modality where the treaty constitutes a legitimate interpretation, whether lawful or not, with regards to the modification, evaluates the existence and content of the agreement between the parties. An interpretative agreement is "easy", feasible by the entire range of interpretative means that are guaranteed by the VCLT. Its own significant attribution to the treaty founds various elements towards an informal modification that proves the performance of a consent that binds the different obligation to a stipulated agreement. From the probative point of view, the modification emerges from the ultima ratio which contributes to the intention of the parties where in the concrete case the actual element is discriminating through the boundary between interpretation and modification (Schwarzenberger, 1968; Feldman, 2009; Gardner, 2012)[319]. The parties through their own will constitute a criterion of reference which results as a not so satisfactory solution in a general way. As an alternative we can

[318]Article 39 VCLT: "General rule regarding the amendment of treaties-A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide (…)".

[319]Schwarzenberger indicates: "(…) that the desire for ex tunc effects would determine the interpretative effect, that of effects ex nunc the effect modifying the subsequent practice (…)".

say that the limit of affirmation is a pure fact where the difference between modification and interpretation is formal (Feldman, 2009), and/or in fact does not exist (Engel, 1967; Mcginley, 1985; Kammerhofer, 2012; Liang, 2012)[320]. We cannot however say that there is reason which excludes informal modification in a general way where in many hypotheses it recognizes that the obligatory passage which affirms the subsequent and certainly prevailing general custom of the treaty.

Formation and evolution of treaties. Application practices and customary rules

As we have perceived from the previous paragraphs, the subsequent practice, that is, a custom that creates a new formation, can influence and modify a treaty. Above all we mean the formation that contains treaty rules that become customary and take on a codificative nature. On the other hand, we note the conduct of states that continue, in a homogeneous manner also through conventional provisions, to maintain a behavior that goes

[320]Engel, stating: "(…) that in both cases the text remains intact, while the contents are modified (…)". Kammerhoffer affirms: "(…) that the practice produces in any case a change on the treaty, since it always incorporates external, political or moral, elements (…)". Liang states: "(…) that the distinction is "mere fiction" (…)".

outside this type of obligation based on an opinio juris. The attempt to distinguish the informal modification from the subsequent custom is based on the fact that the norm followed from the conventional point of view and the customary value as a psychological element is perhaps "stronger" than the practice itself. Accepting the norm as it is imposed in a general way within the group of states means undergoing the relative shift from the relative consent that is given to the contractual obligation and towards the belief that the legality of the norm follows the so-called opinio juris (Crawford, 2014; Liakopoulos, 2020; Liakopoulos, 2020b)[321].

Within this contest of analysis the ILC has rejected the consensus theory of custom as well as part of the doctrine (Kunz, 1953; Fidler, 1966; Akehurst, 1975; Bos, 1982; Evans, 2917; Thirlway, 2018). Consent is a sufficient condition to prove the customary

[321]"The possibility of recognizing the psychological element of the habit, as a condition at least sufficient and at least in the formative moment of the norm, would not be emphasized, in the passage from conventional to customary law. In fact, two phases would be more easily distinguished: formative, which concerns the treaty, certainly characterized by an effective consensus to bind itself to a determined behavior, and a subsequent one, of transformation in customary norm, where it would be easier to speak of a conviction (that is of a progressive conviction) of the community of states the legal nature of the rule.

bond (Macgibbon, 1957; Cheng, 1965; Sohn, 1986; Bodansky, 1995) since it treats an acceptance of the rule as customary that comes from a convention as required by Article 38 VCLT (Noute, 2013), which reports the relationship between custom and treaty[322].

On the other hand, the theoretical position where the psychological element of custom is connected partly or wholly (Tunkin, 1961; Jennings, 1983; Zemanek, 1995; Scott, Carr, 1996; Elias, 1996; Petersen, 2008; Schlütter, 2010; Kammerhofer, 2012)[323] with consensus (Macgibbon, 1982; Weil,

[322]Article 38 VCLT: "Rules in a treaty becoming binding on third states through international custom-Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third state as a customary rule of international law, recognized as such (…)".

[323]Tunkin affirms: "(…) that the custom is "expression of the will of the state of its agreement (…)". Jennings, regrets: "(…) the times in which the opinio juris was more "frankly" called "consent" (…)". He assumes a consensualist perspective, sometimes highlighting the value of tacit consent even denying that a custom constitutes a true "tacit agreement". Wolfe, states "(…) that the acceptance criterion is clear, comprehensible, verifiable and "has the confidence of the government of the United States and peoples" (...)". Zemanek: "(...) for which consent is a sufficient condition in all phases of life of the custom, not only in the formative one (…)". Scott and Carr indicate: "(…) that consent is implicit in participation in international practice or community (…)". Elias derives: "(...) the

1983; Danilenko, 1988; Müllerson, 1998; Kolb, 2003; Dinstein, 2006; Arangio-Ruiz, 2007; Kadens, Young, 2013)[324] concerns the formative phase of the norm (Mendelson, 1995; Tasioulas, 2007)[325] highlighting that the formation of the norm which is part of the consensus to the treaty becomes part of a necessary distinction that separates the initial, consensual will from the

consensual foundation of general customs from that, alleged, of particular customs, having to be the norm of identical recognition for both forms of customary law (…)". Petersen, "(…) taking up the "Lotus principle" from the PCIJ homonymous sentence, for which the will of the states is fundamental for the existence of a bond (…)".

[324]Macgibbon recognizes: "(...) that some form of consensus, although vaguely defined, is the foundation of customs (not embracing a rigidly consensualist approach (…) recalling "(…) the idea of Fitzmaurice for which consent is "latent" in the formative moment, and evident in that of the assessment (…)". Weil indicates: "(…) that consent is not with certainty the foundation of customs but "acceptance never ceased to be a linchpin in the classic theory of custom (…)". Danilenko speaks: "(…) of a widespread and "unstructured" consensus (…)". Müllerson indicates: "(...) that it is not possible to ignore the role of consent, especially in the relationship between customs and the treaties (…)". Kolb indicates: "(...) that the psychological element is given by a mixture of will-elements (opinio juris) and non-will-elements (general practice binding all states (…)". Arangio-Ruiz underlines: "(…) that it is not the same consensus that underlies the treaties, but rather something peculiar to the customary process (…)".

[325]Mendelson recognized: "(...) that consent is necessary at least for the

psychological element of the subsequent custom, i.e. the true opinio juris. We can take into consideration that in this way a particular level is formed at a treaty which becomes general and which proves a psychological element that is different from the consensus of a treaty norm, thus demonstrating attention to each state/s part of the group[326]. As regards particular customs, the presumption that the psychological element only derives the practise as happens in general customs is denied (Elias, 1996; Thirlway, 2018)[327].

formation of the norm, since there cannot be a "opinio juris" at this stage (...) but denying that it is only possible to affirm that consent belongs to the formative phase and the opinio juris to the one in which the custom exists, since the process is continuous (…)".

[326]Conclusion 16 [15] of the work on the identification of custom, which in the second paragraph states: "To determine the existence and the rule of particular customary international law, it is necessary to ascertain whether there is a general practice among the states that is accepted by [each of] them as law (opinio juris) (…)". About the elimination of "the each of them clause", which, however, specified the Drafting Committee, was not meant to exclude the necessity to prove acceptance by each state (…)". (A/CN.4/L.872, p.5)

[327]The main distinction between general and particular customary law is identified in a higher standard of proof. In the first case, that is to say, the principle iura novit curia is valid (for which the judge has the burden of ascertaining the existence and the content of the unwritten law), in the second case, however, is the part that invokes the norm that should prove its

The possibility that the conventional provision thus becomes customary in time and also applies to third states that respect the treaty is also recognized by the jurisprudence of the ICJ[328] despite the fact that it is difficult to ascertain that only concerns the states party to the treaty that negotiate and ascertain modifications and subjective intentions. The paradox of the availability of the practice above all in the implementation phase of the treaty results as an affirmation of the customary nature of the norm (Baxter, 1970). The customary norm has general value and resolves the paradox regarding the behavior of the subjective

existence, and therefore the acceptance by the other party involved.

[328]See article 38 VCLT, and the decision of the ICJ in case on the continental shelf of the North Sea (1969), par. 71: "(…) in so far as this contention is based on the view that Article 6 of the Convention has had the influence, and has produced the effect, described, it clearly involves treating that article as a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general corpus of international law, and is now accepted as such by the opinio juris, so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed. At the same time this result is not lightly to be regarded as having been attained (…)".

element of states extraneous to the treaty (Baxter, 1965-1966; Bos, 1982; Danilenko, 1988; Kolb, 2003; Dinstein, 2006; Ashley Deeks, 2012).

The "problem" this time is that the treaty enjoys universal participation from a few third states in which the practice occurs (Schachter, 1996; Dinstein, 2006). Thus we cannot exclude that state practice constitutes an important factor in the evaluation of a transition from conventional to customary provisions given that this continues to have importance for contemporary international law (Czaplinski, 1989; Merson, 1996; Müllerson, 1998; Dinstein, 2006; Jia, 2010; Payandeh, 2010, Tomka, 2013; Casallas Mèndez, 2015)[329].

[329]Dinstein affirms: "(…) that the problem of distinguishing between practice in the application of the treaty and customary practice must be solved at the level of the psychological element, and concerns in every case only the rule that regulates the relations between states parties to the treaty (…)". Czaplinski denies: "(...) the possibility of "simultaneity" between the treaty and custom precisely because of the impossibility of distinguishing the practice in the application of the treaty and the one motivated by opinio juris (…)". Merson indicates: "(…) that, as noted by the ICRC, a custom of humanitarian law cannot be ascertained only on the basis of states that are not party to the First Protocol to the Geneva Conventions (…)". Müllerson confirms: "(...) that of states parties to a Convention Notes on the formation or evolution of a connected custom (…)". Jia, "(…) highlighting how a practice that "surpasses" or "contradicts" the treaty maintains a link with it

Practice and negotiation for the conclusion of treaties

The object of our analysis includes the relevant behaviors that effectively identify the formation of a custom that starts from the treaty, as well as excluding the relevance of a practice that states produce in a general way during the negotiation phase of a treaty. Already the ILC connects to each specific treaty, in an exclusive way, the customs that concern the negotiation of treaties in general (Sender, Wood, 2017). Thus, the connection with the contents of the treaty that is concluded and which constitutes the main object of an analysis of the conduct of the states to establish the strength of the treaty or not is excluded.

The way in which states proceed along this path does not exclude that the purposes of a negotiation also serve to form customs that concern the legitimate coming of an international treaty. This type of rules is the subject of a convention of a codificative nature such as that of Vienna of 1969 which implements the practice after a long course of modifications. Codification treaties that date back and are susceptible to changes in practice and which operate on a conventional or customary level.

(…)". Tomka recalls: "(...) that the practice of applying a codification treaty, in particular, may not be motivated by opinio juris, but by the conventional constraint (…)".

An element of practice, evidence or custom. The case of the treaty

Wood, within the spirit of the work of the ILC and through its own reports, has underlined that the practices that states seek to implement "in connection" with the treaties to which they are party[330] demonstrate the importance they play for the acts that concern the negotiation that leads to the conclusion of the treaty, thus confirming that this practice forms habits that concern this type of aspect and that is the subject of discussion despite the fact that the treaty itself can be taken into consideration and in this capacity.

The formation of customary law as a practice makes the ILC to expressly recognize the importance of evidence for the customs and opinio juris of the states in partem[331]. Thus, the possible probative value of a conventional and articulated provision

[330]See conclusion 6 [7]: "("Forms of practice") of the work on the identification of custom, which in the second paragraph identifies not the treaty itself, but "conduct in connection with treaties". (A/CN.4/L. 872, p.2,).

[331]We remember that in the conclusion 6 [7], paragraph 2, among the "forms of state practice" we indicate that undertaken "in connection with treaties", rather than the treaty itself.

(D'Amato, 1987; Nadya Sadat, 2018)[332] of a practice where the parties put the treaty documents first and undertake this path of bindingness is doubted (Weisburd, 1988 ; Wolfke, 1993; Scott, Carr, 1996; Tomka, 2013; Andenas, Bjorge, 2015; Wood, 2016)[333] providing clues to the opinion of legality thereof[334].

The definitive value of this type of evidence in most cases also accompanies other useful elements to effectively ascertain the

[332]Borrowing the expression used by D'Amato: "(...) to define the psychological element of habit: not "opinio juris", but rather "articulation" of the norm that imposes or permits the conduct undertaken (…)".

[333]See for example Weisburd: "(…) the adherence to the treaty could be a form of practice, but the treaty itself does not prove a custom in a definitive manner (…)". Wolfke distinguishes "(...) the treaty as a possible proof of practice, of opinio juris or of habits, in the case of a codification treaty (…)". Scott and Carr affirmed: "(...) that sometimes the evidential value is greater than elsewhere, the International Law Association, the Final Report of the 2000 London Conference: Statement of Principles Applicable to the Formation of General Custom International Law (denying on page 43 that the treaty constitutes definitive proof) (…)". Tomka highlights: "(…) that written texts constitute the material analyzed with priority by the IGC in the assessment of customs (…)".

[334]It should be noted that the Commission recognizes in the Conclusion 10 [11] ""(Forms of evidence of acceptance as law (opinio juris))" of the work on the identification of custom, that the "treaty provisions" (no longer, this time, the conduct connected to the treaty) may represent proof of the psychological element". See A/CN.4/L.872, p. 3.

practice which is sufficient, general, homogeneous and accepted as an obligation and a right. Thus it is understood that the treaty itself constitutes a form in practice (Evans, 2017; Thirlway, 2018), as we have also seen from the subsequent practice of the former Article 31.3.b) VCLT (Dörr, 2018). Additionally, as a result it is inserted in all possible state conduct, i.e. practice and agreements that a state concludes from international treaties which after become effective. It is also part of the evidentiary aspect as recognized by the ILC and which is specified through the repetition of a rule in several treaties which cannot be understood as sufficient to produce a customary norm that confirms the treaty in effect of a representation in itself as a state practice (Thirlway, 2018). The ILC limited itself to describing the relationship between custom and treaty in a way that already suggests jurisprudence as we have seen in the North Sea Continental Shelf case. We must first separate and identify that the practice comes as a possible formation of customary norms that start from a treaty, i.e. the one that states implement in fulfilling obligations of a treaty nature.

(Follows): Treaty and subsequent practice

The behavioral practices of the states influence the treaties since they are acts that are part of the general conduct of a state. The

possibility of distinguishing between the practice and the application of the treaty has as a consequence the motivation of the opinion juris, thus distinguishing the conduct which seeks to motivate the obligation to fulfill a treaty as well as to inform the resulting custom. In his third report on the subject, Nolte stated that: “From a purely objective point of view, however, the conduct that the states carry out as bound by the treaty is capable of assuming the characteristics of generality and homogeneity required (...)”.

As regards the objective element, it is found in acts that apply the individual treaty which are not dissimilar according to the subsequent practice which has interpretative objectives as revealed by ex Article 32 VCLT (Noute, 2013), as it is the practice that guides the unanimous agreement of the parties. From a subjective point of view, the verification is reiterated that the conduct implements the treaty rather than requiring in itself the body that is competent for the implementation of international treaties and/or that forms international custom starting from the treaty where the relevant subsequent practice is based and interpreted according to the former article 32 which constitutes its own implementation (Schwarzenberger, 1968; Villiger, 2011).

The practice manifests an agreement of interpretation which clearly constitutes state practice as a certain element for its own formation of a custom which concerns the consensus between the acting states and the common belief of legality which is necessary, shared by the states which do not assume the role of agents necessarily. The possibility of recognizing the formative phase of the customary norm as a consensual element is considered sufficient and concerns the exclusion that the interpretative agreement is necessary to take into consideration the practice of the treaty for the formation of a custom starting from the treaty. It is necessary to recognize that the practice that implements a treaty does not guide a unanimous agreement which is interpreted according to article 31.3.b) but only according to the former article 32 which equally becomes a sufficient practice to accept, constitute a custom (D'Amato, 1987; Nolte, 2013; Nadya Sadat, 2018). This type of custom could have a general character for some or all parts of the treaty (Nadya Sadat, 2018)[335].

[335]The possibility that a treaty will be modified by a custom, even a particular one, and also, that is, between some parts of the treaty alone. In the latter case, it would not be an "informal change" (as it would, in hypothesis, require unanimous agreement) but rather a modification based on the agreement of some parties only. Unless it recognizes the prevailing legal effects on the treaty with the informal agreement, the particular custom

Towards codified law

By trying to identify the ways in which the customary law of a norm which is codificative evolves, the effects of the practice both on the treaty and on custom are verified, given that both sources have the same content. Thus the terms "progressive, integrative development" and "codification"[336] are adopted, thus showing the hypotheses that exist as a similar coincidence between the conventional norm and custom and in the case of codification the hypotheses where the two norms arrive at a distance as an effect of a different practice (Nadya Sadat, 2018)[337].

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category would seem to be the only one that could be used to form the basis for such changes.

[336]Expressions notoriously used in Article 13.1.a) of the San Francisco Charter, which attributes: "(...) this competence to the General Assembly, and 1 to the Statute of the International Law Commission, a subsidiary body purposely established by the Assembly (…)".

[337]We assume the perspective of state practice in an attempt to highlight its role in the possible change in the relationship between codified custom and codification treatise. A similar perspective, for which practice is the driving force of development, even if not necessarily "progressive", in international law.

The Commission during the identification which concerned the customs sought to limit and resume under investigation and control the content of the ruling of the ICJ on the Continental Shelf of the North Sea as a type of rigorous codification effects, generation and crystallized affirmation of a codification right.

The Commission thus took into consideration the part where the ICJ stated with a conventional basis that a "fundamentally norm is created" (Kohen, 2004)[338], where in itself it constitutes a custom that immediately and directly transposes a conventional norm into customary law instantaneously and with the participation of a treaty that represents, includes the states as interested parties[339]. The ILC has ignored this argument by seeking to recognize the special category of states that are

[338]Referring in general to the possibility of generating a custom from a conventional provision, ICJ states: "(…) It would be in the first place that the provision concerned should be, at all events potentially, be of a fundamentally norm-creating character such as well as forming the basis of a general rule of law (…)". (Continental platform of the North Sea, 20 February 1969, para. 72,).

[339]ICJ, par. 73: "(…) with respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of states whose interests were specially affected (…)".

"particularly concerned". The ICJ continued to advance the reasons where it preferred to exclude the possibility in itself of a conventional norm that is considered directly within customary law (Czaplinski, 1989; Schafter, 1996; Wolfke, 1998; Tomka, 2013). In reality, the treaty itself cannot consider the form of practice that must be understood in the negotiation phase as a crystallization period that follows the generation of the treaty.

The analysis follows the dictum of the ICJ itself as we can see in Nicaragua v. United States case. This position occurs even when the conventional norm and custom remains separated on two levels (Starski, 2017)[340]. Thus, a state practice is assumed

[340]Already in the judgment of the jurisdiction we read: "(…) the court cannot dismiss the claims of Nicaragua under principles of customary and general international law, simply because such principles have been enshrined in the texts of the conventions relied upon by Nicaragua. The fact that the above mentioned principles, recognized as such, have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions. Principles such as those of the non-use of force, non-intervention, respect for the independence and territorial integrity of states, and the freedom of navigation, continue to be binding as part of customary international law, despite the operation of provisions of conventional law in which they have been incorporated (...)" (Nicaragua v. United States, Jurisdiction, 26 November 1984, para 73). In the judgment on the merits of the ICJ, after ruling out that the San Francisco Charter: "(...)

verifying the influence that seeks to diversify the norms when both exist in a similar and identical way. The conventional provision is thus resistant and susceptible to any type of interpretation and above all in an extensive manner where the informal modification evaluates the precise, rigorous particular character of implementation. The change in each practice thus influences in a precise way and affects the customary norm, especially if the content is identical and there are no requirements that tighten those that are connected with the subsequent practice as a value of authentic authentication and with informal modification.

State practice modifies the customary norm by influencing in some way the conventional norm of an identical content, recognizing in a possible way every modification of the treaty as a hypothesis where the treaty is modified by means of a subsequent custom[341]. This type of problem concerns the states

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has the same content as the customary law on the prohibition of the use of force, confirms that "even if a treaty norm and a customary norm relevant to the present dispute were to have exactly the same content, this would not be a reason for the trial of the treaty process must necessarily deprive the custody of the separate applicability (...)" (Nicaragua v. the United States, Merit, 27 June 1986, para 175).

[341]"Unlike the hypothesis already analyzed, the particularity in this case is that the custom already exists, and coincides (at least in part) with the

that are part of a convention that emerges after the relevant codification and rely on the codified custom that modifies the practice that participates and accepts it. In other words this concerns the states that are parties to a universal treaty and of a codification system. Otherwise, the effect of the new customary rule has to do with the interpretation of the treaty as a new rule which applies to the parties according to ex Article 31.3.c) VCLT (Dörr, 2018) and which is not part of of the subsequent practice of the ex artice 31.3.b)[342].

Incorporation, customary generation and, crystallization as a modus of codification

It is obvious and clear that the influence of a treaty on customary law focuses on the dissuasive or hindering effect that represents the progressive development of law formation (Baxter, 1965-

conventional arrangement, the case discussed above concerns instead a customary occurrence, which modifies the conventional arrangement (non-coding) as lex posterior (…)". (Nicaragua v. the United States, Merit, 27 June 1986, para 175).

[342]By virtue of Article 31.3.c) VCLT, which in this sense points out the affinity with the hypotheses foreseen by the letters a) and b) of the same paragraph. In this case it would not be (only) of a subsequent practice, but of a subsequent practice which has become customary, therefore relevant, in fact, as a (customary) "rule".

1966; Weisburd, 1988; Meron, 1996)[343]. These are the hypotheses that coincide totally or partially with the conventional and customary law. These also work as a coincidence that ceases due to the new general practice which affects the interpretation of the treaty[344] and finally constitute the new custom that modifies the existing one. The new practice reveals that the unanimous consent of the states is necessary and sufficient for a general and uniform practice also for third ones, as the norm, that modifies the opinio juris which respects the previous custom, and is accepted autonomously[345].

[343]Baxter states that: "(...) a "declarative" treaty, or rather a codification, could block the evolution of customary law (…)". Weisburd states: "(...) on the contrary, that a codification treaty could not "freeze" a custom, since it is the practice of states that matters (…)". Meron notes that: "(...) the evolution of international humanitarian law applicable to non-international armed conflicts was not effectively blocked by the few rules included in the First Additional Protocol to Geneva Conventions (…)".

[344]As it would be a practice in any case "in the application of the treaty", precisely because the norm coincides with the customary one. Such a practice is notoriously valid at least as a means of interpretive subsidiary ex Article 32 VCLT.

[345]That is to say regardless of the evaluation of the requirements that should characterize a subsequent practice capable of authentically interpreting the treaty by ex Article 31.3.b) VCLT, or by modifying it informally (i.e., the unanimous agreement).

As regards the impeding effect, it “plays” a particular (sensitive) role during the codification phase, i.e. at the moment that the treaty is established and is consequently recognized as a practice where for a long period (during the negotiation phase) it was accepted as right. For some states that want to violate the codification provision (Jennings, 1983; Weil, 1983; Czaplinski, 1988; Kolb, 2003; Pellet, 2011; Tomka, 2013; Mathias, 2016) the offense that exists due to a different general custom is justified with a dissuasive manner only in the letter of the treaty, that is, an investigation that operates along the codification path. This type of research is based on a “secondary” evidence, we can call it, which emerges from international jurisprudence and which determines the accumulation of a new state practice which is always part of a commentary work (Pellet, 2011). By overcoming the coinciding phase between treaty and custom, states can violate the letter of a codification treaty which demonstrates the overcoming of the norm which ascertains the subsequent operation for the collection of the new practice which is different, combined with the proof of the psychological element.

The impediment effect is part of and considers the crystallization phase where the moment of negotiation of the treaty allows the consolidation of a sufficient practice given the declarations of the states and the opinio juris which contains the declarations for the

affirmation of a new custom that is already found in the formation phase (Schachter, 1989)[346]. About the coincidence between the actual coincidence and the conventional phase of the custom states that: "(...) the treaty is not explicit in indicating its codifying nature"[347]. It would remain difficult for the states, as in the case of codification in the strict sense, to distance themselves from the prescribed conduct, justifying itself by reason of an alleged modification of the general customary norm. In this case it would also be necessary to provide evidence of a new practice sufficient to overcome that accumulated in the preparatory work phase of the convention itself (Stein, 1985; Charney, 1993)[348].

[346]We refer above all to multilateral treaties: "(...) concluded following intergovernmental conferences, for example with the third UNCLOS conference the rules on the exclusive economic zone, on the delimitation of the archipelagic waters and on the territorial sea boundary are considered "crystallized" (…)".

[347]The deterrent effect: "(...) is clearly greater if the treaty recognizes codifying a custom, as for the codification treaties in the proper sense, but it is difficult to find such a declaration in a treaty that would crystallize a custom (…)".

[348]Stein affirms that: "(…) differently from the codification in the proper sense, in essence, a "crystallization" treaty could be used to discourage states from adopting a different behavior not because of its letter, but because of the fact that the custom has just been consolidated. During the preparatory work, it was also emphasized in the doctrine that the negotiation

When a treaty generates a custom it does not mean that the new generation is "ready" for the conventional provision which in itself and immediately constitutes the custom. As described by the ILC, this case is already recognized by it as also by the VCLT according to article 38 which provides the treaty with the relevant impulse and spreads the following practice as it is accepted by law, such as to generate custom (Scott, Carr, 1996)[349]. The parallelism between conventional and customary norms produces the conclusion of a treaty remotely and in tempis. A treaty that cannot necessarily be a codification. The impeding effect of this type of treaty is minor and the letter of its preparatory works can hinder the removal of the practice where the treaty has generated over time and which is thus articulated by the convention it is part of. It is easier to verify the hypothesis that custom changes in the same way that the treaty that influences the interpretation changes.

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of multilateral treaties is such as to facilitate, with respect to the past, the assessment (of the formative moment) of a custom (…)".

[349]Hypothesis, on the other hand, expressly recognized by Article 38 VCLT, which underlines, as Scott and Carr speak of: "(...) rule set forth in a treaty from becoming binding upon a third state as a customary rule, thus referring to a process that starts as a result of the conclusion of the treaty (…)".

The circumstances created are part of the considerations that depending on the number of parties to the treaty and the type of custom of a particular or general nature which are included. It is possible for states to undertake a new practice which thus produces a particular custom. This also exists for a third rule that derogates the original one. Another factor that conditions it is certainly time. The force of attraction of the norm that is written for a codification treaty prevents the affirmation of a practice that is different. In any case, this reduces the increase in the distance between the date of entry into force of the treaty itself[350]. It should be underlined that the practice that modifies a custom corresponds to a conventional norm that determines a modification that considers the practice as an application of the same treaty which is relevant for the interpretation of the treaty according to ex Article 32 VCLT (Noute, 2013). At the moment of existence of the agreement, this practice also represents the authentic means of interpreting the former Article 31.3.b) according to the content of the agreement which informally

[350]On the contrary, states could justify a different practice, therefore able to change the custom, on the basis of an alleged inadequacy of the codified norm. The age of some of the treaties dating was one of the reasons indicated by Nolte in proposing to the Commission to investigate "Treaties over time" in 2008. As certain important multilateral treaties reach a certain age, they are likely to arise in the future. (A/63/10, Annex A, paragraph 6).

modifies the treaty.

Which practice modifies the codification rule? The role of progressive development

The presence of a treaty that codifies or we can say that limits the progressive development of general international law is customary law. Thus we cannot exclude the evolution of states' practice every time a non-existent discrepancy arises between conventional and customary law (Jia, 2010)[351]. To this point, from an initial or subsequent situation of coincidence or overlap

[351]Jia "(…) identifies the example of international humanitarian law, which would have evolved beyond the terms of the Geneva Conventions and its Protocols (in particular regarding non-international armed conflicts), in particular mercenaries are sometimes granted the status of "prisoners" of war despite the letter of Article 47 of the First Protocol. Another example would be that of the 1979 moon treaty, which was the subject of limited ratification, and therefore likely to be superseded by the actual practice of future lunar exploitation. Another example would be the 1994 Agreement on Part XI of UNCLOS, concerning the exploitation of the seabed: the Agreement would constitute an articulation of the actual state practice, many of which (in particular the United States) rejected the regime described by UNCLOS (with particular reference to the methods of collective financing of mining operations (…)".

of the departure between the sources, we witness a progressive development[352]. The practice thus intervenes towards a path that modifies the two rules and that it is necessary to verify the conditions and the relative consequences. The customary law can modify the practice that respects the rigidity that characterizes a treaty. The possible modalities of treaty modifications function as a means for a custom that tests the possibility for an informal modification of a treaty that forms codification.

Evolution of a codification custom after the modification of a codification treatise

State practice influences more easily the modification of the customary norm and mainly the identical conventional norm. The modification of custom produces a modification of the treaty (Schachter, 1989; Czaplisnki, 1989; Wolfke, 1993; Guzman, Meyer, 2008; Jia, 2010)[353]. Thus we intend to understand the

[352]Expression used here in a sense not too distant from that which can be inferred from Article 1.1 of the ICJ Statute: "(…) if, in fact, progressive development should be achieved through cooperation between the Commission and the states (the first by drafting convention projects, the latter commenting on them), in this case this development would be carried out by the states, which evolve with their subsequent practice a codification treaty (…)".

[353]Czaplinski: "(…) denying that there may be a true normative coincidence

conduct that proves the legitimacy where the states have to overcome the obstacles that are represented by the existence of the codification treaty and the possible codification and conclusion works. The existence of a custom makes the regulation of this area so different that it respects a “soil” that has not yet been regulated (Crawford, 2014). The custom modifies this change which identifies the contractual norm with different modalities thus assuming that the custom codifies in a general way and which distinguishes the scope of the treaty of codification and those that the states undertake as a conduct. The existing interaction with the particular customary law functions as an effect of the new custom which is part of the interpretation of the treaty.

The codified bilateral treaty resembles the multilateral one which is ratified by a not particularly large number of states. We are thinking of the change in practice among third states that respect the treaty which modifies the general custom that prevails over

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between custom and treaty (…)”. Wolfke: “(...) highlighting how a codification cannot be perfect because the customary law is always evolving, and speaking of (…) “intermediate' norms”, in the case of codification treaties or even habits generated by treaties (…)”. Guzman and Meyer underline: “(...) how a formal change would not be necessary precisely because the convention codifies customary law (…)”.

the treaty (Thirlway, 2018)[354]. The custom that is modified applies in the treaty of codification or extinction (Jia, 2010).

An almost universal treaty occurs from a codification treaty (Sinclair, 1986). In this case the obstacle to a new practice is general, uniform and obviously greater. Most of the international community is bound by custom of a conventional nature. The difficulty coincides between the sources of international law that distinguish the practice that undertakes the conventional bond between that supported and the opinion juris. Thus, the position of each individual state is verified evaluating the conditions that describe the modification of a treaty by means of a custom, as participation in a new practice in force and as a belief of acquiescence and/or legality (Liakopoulos, 2022)[355]. The psychological element that distinguishes the moment of practice distinguishes the consideration of the relevant practice that

[354]Thirlway states: "(...) that the "amendment" of the codification treaty could only be referred to when the contracting states also participate in the new practice; only jus cogens would have "prevalence" over previous treaties (not jus jusitivum), but ultimately recognizing that the question remains "unsettled" (…)".

[355]It is therefore necessary to assess the acquiescence: "(...) if not the direct participation, of the state to conduct which originally constitutes a violation of the treaty, in which case it should be noted that, being the universal treaty, the impulse to the new practice would come from within the circle of contracting states (…)".

modifies the codification custom of the application of the codification treaty as a subsequent practice according to the interpretation of ex Article 32 VCLT (Noute, 2013).

This problem does not exist for states that have complied with a treaty where the practice finds its place in the customary context (Jia, 2010). We mean of a codification treaty where third states form a particular custom, as it is not possible to demonstrate the participation and/or acquiescence of a new practice for the states (Liakopoulos, 2022) that are part of the codification treaty. In a codification treaty, third states, that undertake the different practice where the codification norm must be in some way "downgraded" towards a particular custom, are widespread (Kolb, 2003)[356]. The particular and general nature of the custom depends on the participation and acceptance of the practice. In the dissemination of a codification treaty, the distinction is thus made for the protection of the moment that the consequences on the level of verification between the categories are different[357].

[356]Kolb: "(…) indicating how a codification treaty could lead to an abrogation of the general custom or to its downgrading to a particular custom (…)".

[357]Due to a particular custom, try the acceptance of the individual states, where for a general custom the principle "iura novit curia" is valid, therefore once the existence of the norm is proven it is certainly binding for all states (save the persistent objection or, in fact, particular derogations duly proved.

Another hypothesis of a new particular custom is that for some treaty states thet modify their practice inter se producing a new customary norm. A codification treaty that derogates in a general way the identical conventional provision. In such an occasion it is appropriate to make an analysis of the requirements that have a hypothetical nature.

The (real) will of the acting states avoids the complexity of the investigation since it functions as a psychological element to demand legal certainty, in case of a modification of the norm which codifies the actual probability of the states which form the conventional level and which conclude a new treaty amending the existing one between the formal procedure. Modification by means of a custom consolidates the treaty of a codification. The problem thus becomes more complicated when it is placed on a level where the psychological element considers the hypothesis that an informal modification of a codification treaty will have to be supported by the agreement of all the contracting states.

This hypothesis recalls the new custom which modifies the codification treaty. This is an interpretation of a new custom pursuant to Article 31.1.c) VCLT (Noute, 2013). An interpretative value that regulates the parts that clarify customary law of a general or particular nature (Benvenisti, Nolte, 2018)[358].

[358]About the scope of Article 31.3.c) VCLT, which by now is considered to

The practice that generates the different custom qualifies the subsequent practice in the application of a treaty given that we are talking about a situation that coincides between the conventional and customary norm. We need to distinguish between two moments. In the interpretative process it is assessed that the practice itself "circulates" as a means of interpretation based on Article 32 VCLT with a subsidiary manner and in practice it becomes customary which is relevant according to the former Article 31.3.c) VCLT[359]. It is an hypothesis that recognizes the normal phase of an evolutionary interpretation in a legal context on which the treaty is based (Arato, 2010; Hollis, 2020)[360].

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include certainly conventional as well as customary rules.

[359]The Commission had qualified all the means included in the general rule referred to in Article 31 VCLT as "authentic means of interpretation", see Yearbook of the International Law Commission, 1966, Vol. II, p. 220 (comment to article 27 at the time): "(…) the Commission is of the opinion and the distinction made in articles 27 and 28 between the authentic and supplementary means of interpretation and the justified and desirable (…)".

[360]The evolutionary interpretation is directly anchored to Article 31.3.c) VCLT. Arato stresses: "(...) that not only the evolution of the juridical sphere, but also the factual one, can lead to an evolutionary interpretation. In this case it should link to the first paragraph of article 31, referring to good faith (…)".

Treaty for modification or informal modification?

The change in practice implements a rule that has both a conventional and customary value since it thus determines the modification of the custom of a treaty (Buga, 2018). The limits are rigid and need clarification given that they regulate the informal modification of conventional provisions which in fact present a customary rule that exists in an informal way for legislative modification that encounters these types of obstacles, i.e. customary law. It is recognized that the modification of a treaty through the formal procedure as well as to a subsequent treaty, informally requires unanimity of the contracting parties and/or through custom. The informal modification is recognized since the parties to a treaty, even in the abstract, prevents and replaces the initial consensus with a new unanimous agreement that finalizes and modifies the provisions of the treaty as an agreement that is implicit in acts and implement the treaty in a different way respecting possible interpretations. Thus we remember the informal modification which in itself functions as an extrema ratio in the sense that there is no possibility of qualifying an interpretation of an extensive and certainly evolutionary nature, as a divergence that is part of the treaty and its own application.

The splitting of the norm at the conventional and customary level determines a sort of resistance that recognizes the informal modification. It is impossible to prove that the states (part of an agreement of a universal nature that has the objective of modifying the treaty according to the presence of the opinio juris as stated in the codified law) undertake and accept the different practice that expresses all of them. The possibility of such an agreement of a universal nature means that the modification of the opinio juris is achieved through the practice that it creates and recognizes the different custom as a material element. This is an amendment that is part of a customary law rather than a definitive informal amendment of the treaty. This is an evolution of custom that has a codified nature. The informal modification of a codification treaty thus effectively coincides with the modification by custom[361]. The norm in its application practice at the moment of its existence on the customary level remains absorbed within this.

In case of a codification treaty that does not have a universal nature, it is recognized that the parties tacitly agree to modify their norm which is codified through a different practice (König, 2013). Thus in the case of a universal codification treaty, one

[361]The coincidence of the conventional rule with the customary one would essentially determine the coincidence of the informal modification method with that by means of a custom.

imagines that such an initiative by the states parties allows us to speak of a derogation from the codification norm and not of an informal modification of the treaty. This is a jus cogens that remains possible for states that derogate from the custom of jus dispositivum (Linderfalk, 2020)[362]. It is an exemption that is easily achieved for states even if the needs for certainty go through a formal process, such as a subsequent treaty. We are faced with a derogatory practice which is easy to think that it is actually a material element for a particular custom or an informal modification[363]. The psychological element of such custom emphasizes that custom can resemble a tacit agreement, i.e. that which supports informal modification.

The specific cases are and remain difficult to classify them as informal modification which coincides with the conventional and customary norm and blurs the line between informal and customary modification. At the time of a normal treaty it is assumed that the states parties act in an incompatible way where

[362]It is therefore to be imagined that the codified standard remains in force, at least until, eventually, the state practice in derogation does not spread to the point of determining a change.

[363]As such, capable of derogating from the general codified practice (in the aforementioned limits of the jus dispositivum). Again, practice explains its effects on customary law, rather than on conventional law, by reason of the normative coincidence given by the codification treaty.

their acquiescence to a similar behavior is part of other states that consider that the treaty is modified informally before the custom is established (Liakopoulos, 2022). Custom modifies the proof to a shift of a "qualitative" nature as a psychological element from a unanimous consensus that modifies the treaty. The custom already exists and assumes the intention that the states must directly modify or derogate in itself. Thus the treaty that codifies norms it is amended (Sohn, 1995-1996)[364]. Moreover one tries to arrive at a unanimous agreement, i.e. a fundamental element of an informal modification which is understood as a psychological element of custom. This highlights the consensus that sufficiently conditions and integrates the opinio juris in the formative moment. The effect of a derogation can thus reach the conclusion of a subsequent treaty, through an explicit formal agreement. In other words, this treaty will be able to lead to an effective modification of the codified general custom at the moment that the third states in tempis reproduce a new conduct.

[364]Sohn with reference: "(...) to the effectiveness of the codification treaties and the difficult distinction with the progressive development: states do not like to waste time (...)".

Concluding remarks

At this point we can say that modification procedures bring and indicate negative and positive consequences. The coexistence of the same rule in conventional and customary law determines effects on the level of interpretation and application (Jennings, 1983; Schachter, 1989; Meron, 1996; Jia, 2010). Relationships are complex and can be generated between custom and conventional norms when they function as conventional provisions that are effectively modified and have value for the remainder. From the point of view of control and verification procedures, the treaty entrusts specifically created bodies for its violation (Engel, 1953)[365]. The claim to offer a complete picture definitively distinguishes the changes that occur on the substantive content of the treaty with changes on a procedural level.

The informal or customary modification is without prejudice connected to the procedures that the treaty prescribes its own interpretation. It also verifies the judicial supervisory body that

[365]Recall the position of Engel: "(…) according to which the informal modification of the Charter of St. Francis would in fact be made possible by the absence of actual mechanisms of judicial or political review, in the sense that the unlawfulness of a certain exercise of the powers of the organization it could not be confidently secure where every body is competent to interpret the founding treaty within the limits of its competence (…)".

remains competent to judge a treaty that substantially modifies the function of the tacit agreement or the custom that replaces the content. The source of the modification is important in the sense that the informal modification is a matter where the source of a new obligation is the tacit agreement of a treaty where the consequence is the appearance of a supervisory body that declines its competence. The modification of a jurisdiction by custom considers that the institution is obliged to apply its own rule given that it is part of a general law. This is a case that solves the problem of identification when the habit is formed. It is part of the custom to prevail. It is added that the research carried out by the possible body for a modification that has occurred constitutes a recognition that is authoritative upon the occurrence of the processes that such rulings have no binding value even outside the specific case.

In the case in which a treaty codifies the substantive rules corresponds to a custom of a procedural nature which often recognizes modification and limits even of an informal nature the object of the processes (Liang, 2012). The procedural route is susceptible to modification and results in the few informal modifications that are thus recognized by the cases of the ICJ as referred to in Articles 12 and 27 of the San Francisco Charter. Logic thus attributes the easiness to reaches an agreement of a

unanimous nature to what is required for an informal modification and/or what it requires to a substantial norm for a treaty as a norm that has a customary value to a codification treaty[366]. The passage from similar conventional steps of customary law such as those that establish the bodies of an organization, of a body and, in our case also of the states (Akehurst, 1975; Jia, 2010)[367] tend to recognize the object of informal modification in a procedural or customary way.

Multilateral treaties participate with a universal character that begins to trace and verify the modalities that are actually subject to the modifications that are necessary for the changes in the international reality. An adaptation from an interpretative point of

[366]The obstacles that should slow down the refinement of such a modifying agreement, or rather a shift in the opinio juris, have been emphasized, such as to informally change the conventional provision, when it is also customary (especially in the case of a codification treaty in the strict sense, or crystallization).

[367] According to Jia: "(…) as stated by the ICJ in the case of the North Sea continental shelf (paragraph 72), to become customary the conventional provision should be "of a fundamentally norm-creating character", which is interpreted by most of the doctrine in the sense of excluding the "contractual" or "synallagmatic" provisions 39 (such as those that establish and regulate organs) (…)". Akehurst emphasizes, on the other hand: "(…) that the more likely to become customary would be the provisions more closely related to an already existing custom (…)".

view that reaches a formalized agreement is sufficient to be able to recognize the different custom even in an initial stage. These are valid and demonstrable ways that recognize the respective requirements that are available to a court that calls and establishes international law in force. The judge calls this and takes into consideration the risk of a fragmentation of general international law which considers the rules to be different, linked to previous treaties which support the practice of groups of states that are different and reach a disparate scope. The ILC limited itself to stating that the interpretative solution is preferable when faced with a change in the implementation practice of the content of a treaty which is codified in this way or not[368].

The practice we have seen so far manifests in a different way what is identified by the VCLT according to Article 31.3.b), as it responds to a regulatory framework where customary international law applies the interpretation of the treaties. There are behaviors where states consciously take into consideration the ineffectiveness in the regulatory level and in fact correspond only to forms of international courtesy. Other types of conduct

[368]Reference is made to the conclusion 7 of the work: "(...) on agreements and subsequent practice, which establishes a presumption in favor of the intention to interpret the parties, in the presence of an application practice of the treaty: It is presumed that the parties to a treaty, by an agreement (…)". (A/CN.4/L.874, p. 3).

accompany the psychological element as necessary for normative determination such as customary law which discusses this element in its own nature. The need for a normative will comes in contrast to a belief in legality. The subsequent practice is an interpretation tool of an authentic nature that operates on a similar we can call "schema" (Boisson de Chazournes, 2013)[369] which can have a normative value that is necessary to accompany the psychological element that is represented according to what is envisaged by the VCLT as an informal agreement for the contracting states.

The objective dimension of the practice presents the objective or the material characteristics as a perspective where the unanimous agreement constitutes the major aspect of a distinction of the practice as an element where custom is a means of interpreting the treaties. The possibility of recognizing consent as a psychological element of every type of attitude and as a requirement for the practice itself is identified, thus identifying the parallelism with the dualistic model which uses the description of custom as a source of the international law. The characteristics of the practice emerged in a non-homogeneous picture. It is possible to give exhaustive lists of the declinations of the practice which take into account a verbal practice that can

[369]According to the author it is a consensual framework.

lead to inertia as a generality of the subsequent practice thus requiring the unanimity of the agreement during the interpretation phase. The frequency and uniformity of the practice reduces the variations and the possibility of making comparisons with the consequences of a small number of participating states to resemble problems at different substantive areas. Thus the subsequent practice is identified as a means of authentic interpretation in the total describing the practice in general as part of the possible agreements concluded by a state. The absence of an agreement causes the subsequent practice to be included within its own whole and in any case as a mode of expression of state practice.

A problem of attributing the practice to the state exists in both the areas of investigation and of subsequent practice, assuming a particular importance when the practice is applied to the treaty. It is verified that the act is attributable to a state body. The useful criteria for carrying out this type of operation can be identified in a case where the subsequent practice must not be competent to apply the treaty and its interpretation is known and accepted to a competent body or to one of a higher rank.

Other subjects that are part of an evidentiary function are clear in the case of international organizations, viewed as activities of assembly and plenary bodies according to the participating states.

The assessment of various aspects of the case includes a practice in itself where the customary law interprets the conventional provision and the will of the states, i.e. the psychological element in a general way.
The verification check proves in a substantial and dependent way a concrete case that has to do with the content of the material available where the interpreter uses it. The conduct of other subjects can be seen as the starting point for the state's conduct, i.e. the impulse of the same. Consensus investigates the relationship between customs and treaties that the practice assumes emerging as definition of a sort of continuity in the regulatory process which is described in state conduct that comply with and/or in the violation of a specific norm. It is recognized that the practice can interpret a treaty extensively as a practice that supports the interpretation of an evolutionary type even as a modifier in an informal way that supports a unanimous agreement of the same type as when required by Article 31.3.b) VCLT thus producing a tacit and authentic interpretation. A treaty can be modified by custom through an element of continuity. This custom arises from the practice of the contracting states which makes it difficult to distinguish the hypothesis of an informal modification. The psychological element identifies the distinction. On the one hand, unanimous agreement is necessary

for informal modification and opinio juris requires custom. The convention provision becomes customary producing a certain continuity or parallelism between customary and conventional rules. The verification of this process comes out of the analysis of the content where the nature of the psychological element of the contracting states is oriented towards practice as a presupposition of a reason for the existence of a custom where the practice comes out of the prescription that produces its effects on the customary level evolving, i.e. thus modifying the general custom that produces a particular one (Batson, 2022). This practice is identical legislation where the application of the treaty produces its own effects on the interpretative level. The grateful space of an informal modification is part of such a codification treaty which is more restricted considering that this process supports unanimous agreement. The informal way of modification as a different practice respects the prescription that custom imposes and codifies the treaty as operating on a customary level and as a modification that "influences" the treaty (Brownlie, 2019).

The subsequent practice seems to restore to the states the relative control regarding the treaty to an ex post subjective interpretation which is in contrast according to Article 31, par. 1, VCLT (McDougal, 1967)[370]. What interests us is the relationship based

[370]The "subjective" interpretation tends to search for the meaning desired by

on practice and between customs and treaties. The agreement as a psychological element of a consensual type with a necessary way between practice and objectives attributes a legal value and represents a recognized element (Müllerson, 1998) that connects the sources of international law without taking custom into consideration a pactum tacitum limited to the recognition of a consensus of a material source of law (Koskenniemi, 2006; Kolb, 2016)[371].

The logic of continuity is seen as a kind that mirrors contiguous processes. Initially, authentic interpretation is based on a unanimous agreement, such as the informal modification of a consensual basis and the emergence of a custom that replicates the conventional disposition and the modification according to the basis of a psychological element that distinguishes widespread acceptance among the contracting parties[372]. Then,

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the parts, while the "objective" interpretation seeks the meaning on the basis of material elements, in particular the text.

[371]On the idea of pactum tacitum, supported by Grozio in the seventeenth century, Kolb, according to a: "(…) a purely positivist approach, which is not suggested here to exhume, the consensus of states would be the sole foundation of international law as a whole (…)".

[372]See International Law Association, Final Report of the 2000 London Conference: Statement of Principles Applicable to the Formation of the General Customary International Law.

the subsequent practice seems to reconcile the application of a treaty since the continuous evolution of customary law is an interpretative agreement of an initial nature which can facilitate the opinio juris by supporting the normative value of a state practice[373].

Thus we distinguish the agreement that informs the interpretative or informally modified effect with the psychological element of a custom in a particular, special way that has a precise nature. Differing from general customary law, that of a particular nature requires a demonstration that accepts a tacit agreement between a group of states, as evidence of a recognized need to demonstrate the acceptance of each state part of that group. The topic is particular as regards its distinction between an informal modification of the treaty which is based on a unanimous agreement of the contracting states and a custom which modifies in a particular way and inter se some contracting parties modifying the treaty and not only. We can take into consideration that the control of the psychological element can have a resolutive nature even of an abstract type to a content of a modifying agreement which distinguishes the actual opinio juris

[373]It is independent of the possibility/necessity of recognizing in the opinio juris, in itself, any consensual element, placing the agreement on the interpretative plane and at an initial stage.

of a particular nature. Such an investigation is easy and carries out the definition that finds the tacit and informal agreements or norms where the existence deduces the manifestations of conduct of the states, i.e. the practice.

According to the agreement that is requested by Article 31.3.b) VCLT (Dörr, 2018) we can say that in a general way is the testimony of the need for a condition that is sufficient for an agreement as a psychological and general element of a custom (Elias, 1996)[374]. It is noted that the move away from a consensual perspective in relation to the study of custom is justified by historical reasons that overcome the excessive sensitivity of international law and the will of the statea as well as the political power after the armed conflicts/wars of the last century (Elias, 1996; Kolb, 2016)[375]. Compliance with an international order of new states resulting in the decolonization process is ensured

[374]In the sense that the mechanism of production of a particular custom, based on consensus, could not be distinguished from that of a general custom, therefore also a consensual basis.

[375]According to Kolb: "(…) which also recalls the anti-positivist argument frequently advanced at the beginning of the twentieth century, so if the law were only the product of authority, it would be necessary to imagine a superior authority which attributes to the former the power to produce juridical norms (…)".

(Kolb, 2016)[376]. According to the ILC, the acceptance of a term as a right is applied in the expression of opinio juris and has already been used in Article 38 of the Statute of the ICJ, as a configuration of a form of consent (Bos, 1982; Macgibbon, 1982; Cheng, 1982; Wolfke, 1993).

The existence of an international custom in fact ascertains a certain moment and investigates concrete formations where as a consequence it is easy to affirm or presume that the moment exists with a "sense of legality" rather than identifying the consensual element in the formative moment that supports the emergence of the norm (Koskenniemi, 2006)[377]. The element of consent plays an important role in the formation of customary law. The evidence of a value of acquiescence and the recognition

[376]The consensus of the "new states" would not be a necessary element to the binding, even towards them, of those dating that were born before the coming to be part of the international community by these states. On the historical origins of the expression opinio juris, starting from the Volksüberzeugung idea of the German historical school.

[377]According to Koskenniemi: "(...) the jurisprudence of the ICJ highlights the use of both arguments, that of the existence of the law in general, and that of the particular consensus of the state with respect to the controversial constraint, citing in particular the case of the Continental Continuous Sea North. In this sense, it would seem possible to recognize two types of custom (one based on consensus, the other not), or a mixture, by the court, of custom and general principles (…)".

of the persistent objector (Green, 2016) are viewed as elements that are an important part of customary law and in the works of the ILC. The consensus returns at the moment of verification which recognizes the existence of the law in its applicability and in the opposite case it focuses on the bi-or plurilateral nature of the legal relationship between the states, thus ignoring the absence of a consensus that binds each state with regards to the final decision and which takes into consideration equitable criteria (Koskenniemi, 2006)[378]. This is a pragmatic position that sacrifices the normative nature of law and also speaks of a general norm of a minor nature at a level of abstraction in the concrete case (Kolb, 2016).

The consensual type guarantees a certain degree of realism that respects international law and its subjects who are sovereign entities, thus underlining that the contrast between the traditional conception of international custom as an unwritten norm affirms a gradual consolidation of expectations that are mutual to a level

[378]He speaks of "bilateralization" (…) a strategy of escape from the circularity of the dualistic theory of the habit (as the practice only detects in order to prove the opinio juris, but the opinio juris is necessary in order to distinguish the practice). However, the author highlights how focusing on the solution of the concrete case means falling into the same uncertainty, in any case having to make a decision based on criteria that cannot be identified either subjectively (apology) or objectively (utopia) (…)".

of a community of states and/or a group (Mcdougal, 1955; Akehurst, 1975; Jennings, 1983; Sohn, 1986; Chodosh, 1991; Charney, 1993; Fidler, 1996; Wolfke, 1998; Roberts, 2001; Estreicher , 2003; Guzman, Meyer, 2008; Shaw, 2017)[379]. Also contemporary custom has rigorous consensual mechanisms such as multilateral treaties and resolutions of international organizations that accelerate the production of expectations at a general level (Goldsmith, Posner, 2000; Benvenisti, Nolte, 2013). In the international panorama, the future is inappropriate to wait

[379]Mcdougal affirmed that: "(…) the reaction of the other states to "signals" launched in the form of conduct, but also treaties or resolutions would be decisive. Chodosh speaks of "declarative international law" (…)". Wolfke speaks: "(...) of a "tacit consent system" made possible by the new international forums (…)". Sohn emphasizes that: "(...) states continually create new ways to agree and legislate (…)". Fidler distinguishes: "(...) three possible judgments with respect to the customary law in the new world order, i.e. "dinosaur", "dangerous" or "dynamo" (…)". Estreicher describes: "(…) the modern customary law as "top-down", "policy laden" and "virtually instantaneous" (…)". Shaw affirms that: "(…) true acquiescence must be only that of the states concerned, and not necessarily that of the rest of the international community (…) it seems clear in any case that in the case of an interested state it will be easier to recognize those "circumstances that require a reaction" to which the Commission also refers in order to recognize the acquiescence from the absence of reaction to a practice of others (…)".

the necessary time for the gradual consolidation of a norm that arises from even a tacit consensus of the states that are also initially interested and that come together in a structured way to the norm. Such a law cannot be defined as customary in its own terms and which believes that the intensification of the production of treaties and resolutions of a multilateral nature witnesses a birth of a new form of international legislation of general scope (Chodosh, 1991; Müllerson, 1998)[380].

We can also speak of informal international law which refers to instruments not necessarily of a binding nature but capable of producing certain legal effects (Klabbers, 2012; Kalimo, Staal, 2014)[381], according to the availability of the courts that can use them and the objectives of assessment of customs and the interpretation of treaties especially through subsequent practice (D'Aspremont, 2014; D'Aspremont, 2015; Helfer, Wuerth, 2016).

[380]Chodosh speaks: "(…) of a general international law (…) advanced advanced (and) deliberative, realized through the fora of international organizations (…)".

[381]According to Klabbers "(…) this would be the result of the activity of non-state bodies, which contribute to the affirmation of certain behaviors and values, in order to ensure the necessary adaptation of international law to the change of society (…)". Kalimo and Staal: "(...) schematically identify international informal law in politically binding agreements, instant custom, or soft-law (…)".

Customary law is in itself and is part of infinite processes that lead to its formation recognizing without problems the functions that stabilize the norms as a guarantee of adaptability of norms that are uncertain and by virtue of the permeability of social and political reality (Kolb, 2016)[382].

The loss of value of the practice respects the psychological element (Kirgis, 1987)[383] as a preference of the states, i.e. as sovereign bodies which are not binding in a general way and which prefer ambiguous forms of regulation such as for example custom, interpretation tacit or authentic that is part of a residual freedom[384]. It is seen as a perspective where the state is free and there is no legal constraint that obliges it in an express way

[382]According to Kolb: "(…) in the sense that normativity and adaptability of customary law would be irreconcilable aspects, because they stem from the opposing premises of pure materialism (focused on the practice of guaranteeing stability, tending towards apology) and pure psychology (centered on the opinio juris for of adaptation, in fact a "utopia" (…)".

[383]As evidenced by supporters of compensatory perspectives of the "sliding scale" type. If the Commission rejects these perspectives in itself, however, admits that on the probative level some forms of practice or opinio juris can detect more than others (ibidem), in this way, there emerges again the mixture between substantial and probative element, repeatedly highlighted.

[384]Although it would be correct to state that there is a law of closure in international law for which all that is not prohibited is lawful.

(Koskenniemi, 2006)[385]. We initiate from the Lotus case[386]. The latter demonstrates a residual freedom that allows the evolution of a right to occurs peacefully (Kolb, 2016)[387] states conclude treaties (Wolfke, 1993) which also have a universal nature, being capable of guaranteeing the maximum level of legal certainty which is difficult to modify ex post. The treaties exist as

[385]According to which it would be a "utopia, whereby a certain value, apparently" moral, i.e. the freedom of the state, is imposed as superior to others by virtue of a political choice, without however identifying the criteria for defining the contents of this freedom.

[386]Case Lotus (France v. Turkey, 7 September 1927), p. 18 ("Restrictions on the independence of the states cannot be be presumed") and p. 19 ("Far from laying down to the effect of the laws of the United States of America"). Similar indications can be found in the jurisprudence of the ICJ, in particular in the opinion on "independence of Kosovo" (for example, paragraph 56: "(…) it is completely possible for a particular act as a unilateral declaration of independence not to be in violation without constituting the exercise of the right conferred by it (…)".

[387]Kolb "(…) which highlights how residual freedom is certainly to be recognized in areas in which the law is more certain (ie the rule is expressed or implied in an implicit way), while where there is a gap, but it is possible to make up for it by means of normative principles or social considerations, it would not be appropriate to state the freedom of the state. The residual free will therefore represent an extrema ratio, which could not in any case prejudice the interests of third states or individuals, but, within these limits, it would be immanent to the "limited" conception of international law (…)".

establishing international organizations to matters having to do with the founding acts of international organizations or relating to human rights which are susceptible to informal modification. Codification treaties (Kolb, 2016)[388] represent a certain "road sign" that is addressed to third states according to the interest of clarification to the content of a general, generalizable constraint that extends the quality of customary law as part of the international community (Guzman, Meyer, 2008)[389]. State practice has thus become a necessary instrument for modifying customary and conventional international law. It is a measure of a law which is aimed at protecting the very expectations of the states and change with the modification of these expectations which are formed through the practice (Kohen, 2004; Kolb, 2016)[390].

[388]That is also those that generate a custom after their entry into force, without explicitly affirming that they recognize an existing one and without crystallizing one in formation.

[389]According to Guzman and Meyer: "(…) the "signal" represented by the treaty indicates to third states the conduct which the contracting states deem it to be correct to follow, that is to say, supported by opinio juris (…)".

[390]Kolb: "(…) for which much of the international law actually derives from the conduct of states and constitutes an expression, which would also be the reason why there is no hierarchy between formal sources (…)". According to Kohen the practice is the: "la manière la plus sûre de rapprocher le droit de la réalité (…)".

Informality as a tool that preserves the freedom of states represents a compensatory mechanism in the face of difficulties for the international community of states that reach an express agreement. The identical mode of operation of acquiescence in both informal mechanisms makes customary law (Liakopoulos, 2022) as a subsequent practice and as an interpretative tool that is perfected in a tacit way, i.e. through a direct participation of all the states (Dunbar, 1978-1980; Wolfke, 1993; Müllerson, 1998; Kolb, 2003; Wood, 2016; Crawford, 2018)[391]. The ILC thus finds a position that is dedicated to an order of a context that is often problematic to a description of an institutional imprecision that obtains approval as we have seen in the Sixth Commission of the General Assembly and by the sovereign bodies that do part of a fundamental interest of ambiguous informality of a content that binds, obliges the general scope (Yee, 2016)[392].

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[391]Dunbar affirms: "(…) the possibility that it is "merely a fiction or myth", and indicating that Article 38.1.b) of the ICJ Statute seems to require almost an act of faith (…)". Wolfke indicates: "(…) that almost everything remains controversial (…)". Müllerson explains: "(...) the impossibility of constructing a unitary theory for an "objectively controversial, elusive, constantly changing" phenomenon (…)". Kolb "(...) speaks of it as a "smiling sphinx in the realm of legal theory" (…)". Crawford indicates: "(...) the presence of "paradoxes and contradictions" (…)".

[392]According to Yee: "(…) the states must necessarily rely on a self-

The secondary rules have an important "connection" regarding the recognition of a custom or a "metacustom" where the rules of interpretation pass through their informal processes and the rules of operation do not ignore a discretion that is part of the observer (Yee, 2016)[393]. A certain difficulty indicates that the constitution of formative elements of customs, are part of a holistic nature in the interpretative process that blurs the boundaries between authentic and subsidiary means of interpretation. Thus there is a

governing body such as the Commission in order to clarify the contours of general international law, but on the other they do not seem to want to collaborate with the recent works led by Wood (perhaps, one might think, just for an underground interest to a certain nebulosity of the normative processes). Also remember how, among the members of the Commission (…)". Murase explicitly underlined: "(...) the value that states would attribute precisely to the ambiguity, rather than simply to the flexibility, of the customary process" (see A/CN.4/SR.3148, p.7). "Ambiguity was of the essence and, probably, the raison d'être of customary international law (...) also underline how the development of international law, and hence the work of the Commission, cannot now disregard the approval of developing states, even after only a few states have in fact for centuries could influence its orientation (…)".

[393]That is, who is called to ascertain the existence of customary law, and who to attribute meaning to a treaty, it is a further level of uncertainty, in addition to that which connotes, in substance, informal processes such as the formation of custom and the interpretation of the treaty by means of the following practice.

tendency to restore an open-ended and scientifically deterministic framework in the international law (Fitzmaurice, Elias, Merkouris, 2010; Yee, 2016; Kold, 2016)[394].

Even written law needs to be interpreted when it occurs through subsequent practice. This is seen as a boundary that fades towards the possibility of an informal modification that reproduces the same problems of uncertainty that are connected with unwritten law. The subsequent practice represents an arrow of a conventional sphere that certainly characterizes the same indeterminacy that characterizes and connects customary international law (Pellet, 2011)[395]. Attempts of clarification are

[394]This does not mean that (international) law cannot constitute a "science", since now even the so-called exact sciences are notoriously colliding with a reality impossible to describe in a precise and deterministic way, having to rather relativize the experience data to limits of the observer. precisely in regard to the nature of "art" or "science" of the interpretative process. Kolb: "(…) denies that "geometric schemes" can be applied to the assessment of custom, since it plays a role not only of legal certainty of consolidated conduct, but also of adaptation to new behaviors (…)".

[395]According to Pellet: "(…) this is not incompatible with the observation made above, so Article 31.3.b) VCLT, which attributes to a practice an authentic interpretative effect only by virtue of a fundamental consensus, would testify the nature as a consensual reality also of custom, where a practice of the same type could not have a normative effect without relying on a psychological element of the same type. Here we simply adopt the

endowed to authorities that come from international courts and codification bodies, i.e. as subjects that are destined to encounter resistance from sovereign bodies that constitute the subjects that are masters of international law (Pellet, 2011)[396]. The foundations of the international legal system move from a subjective pole that represents the will of the states to an objective that constitutes the rational principles that protect the common good (Koskenniemi, 2006; Kolb, 2016)[397]. States bring the practice to an equilibrium that performs a compensatory function, thus avoiding giving

"inverse" perspective, in the sense that the following practice would represent the way in which states reproduce on the treaty the same informal (and consensual) mechanisms that determine customary law (…)".

[396]On the coincidence of the tasks of the ICJ and of the Commission in ascertaining customary law and contributing to "progressive development", with the difference that the latter operates institutionally for this purpose and only "ad referendum" (i.e. requiring confirmation from the states), while the first operates implicitly and with a binding effect within the limits of the concrete case and the states involved (…)".

[397]According to Kolb: "(…) the need for the international legal system to find a balance between consensual foundation (subjectivity) and protection of common principles (objectivity) (…) where it is stated that in the theory of sources a "continuous fight" is fought between the two poles of consensus and justice (…) where the need for a balance between "stability" and "change" (...) according to which law, in general, is always a product of the ever-changing balance between "reason" and "will" (…)".

apologies in the primacy of national and state law, and as a result pushing to ignore the role of consensus as the foundation of the formation of the law of treaties (Kolb, 2016)[398].

[398]In this sense, the existence of Koskenniemi's analysis of the customary law when, to avoid the circularity of the dualistic model (practice only detects when the opinio juris proves, but this is only knowable through practice, distinguishing the juridically relevant one), suggests adopting a bilateral perspective, focused on the solution of the concrete dispute between states, reinforced by the use of "intrinsically" equitative criteria applied by the courts. In this way subjective assessments (apology), or criteria incorrectly assumed to be objectively valid (utopia) would not be avoided. Even reducing the customs to "procedural" rules, for the resolution of concrete inter-state conflicts, would not be decisive, as it would underestimate the conflict inherent in international law, and the decision-making criteria would remain uncertain.

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